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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 555

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners would trespass upon the Court's time in reply briefly and in only two particulars.

A. The Government in its Brief in Opposition unwittingly would lead the Court to believe that Petitioners *in fact* were warned that operation of the station without operators' permits was illegal.

A reading of the records discloses no such fact. True the witness Kieling testified (R. 76, 77, 78):

"Q. Now, was there any discussion of any requirement about an operator's permit and the operation of the radio?

"A. Yes, I furnished them with the forms, and showed them how to fill them out, and told them when they got them back to sign their completion report and send it in.

"Q. Was there any discussion about prohibition of operating the radio prior to getting the license?

"A. Yes.

"Q. And can you tell us about that?

"A. That was way back in July I believe, or the first of August.

"Q. And can you tell us the place, the time, and the circumstances?

"A. It was on the telephone, and they wanted me to come out and hook up the base station. And I told them I couldn't hook it up because they didn't have their *station license* yet. And he wanted to use it, and I told him if he would hook it up to 110 and put the aerial on it, and if the milliammeter (57) didn't read over 200 milli-amps, it wouldn't hurt. If it was too much it would damage the tubes, but it wouldn't hurt it seriously.

"Q. Was there ever any discussion about any prohibition about operating the station without an operator's license?

"A. Yes, when I was there the 8th.

"Q. And what was that?

"A. That was when I gave them the forms and told them I couldn't fill out their completion report because they didn't have their operator's license. I told that to Mrs. Sugden. She was the only one there at the time. That was at the house.

"Q. She was at the house?

"A. She was at the house.

"Mr. Holohan: That is all.

Cross Examination

"Q. (By Mr. Wilmer): You told her you could not complete it because they didn't have their operator's license?

"A. No, I couldn't complete it because they didn't have—

"Q. I asked you what you said. You said you couldn't complete it because—

"A. Because she hadn't received her operator's permit. (58)

"Mr. Wilmer: That is all." (Emphasis supplied)

While the witness states his conclusion he warned petitioners, when asked what he said the conclusion he drew is shown to be groundless and not supported by the words he spoke. If anything, the advice which Kieling gave as to how to hook the station up would negative any conclusion of a warning of illegality. The most that can be drawn from his testimony and all that can be drawn from it is the fact he told them the completion form could not be filled out until their operators' permits were received.

B. The net effect of the ruling of the Circuit Court, if affirmed, will be to send the cause back to the District Court to permit the Government to do what it should have done in the first place, if it is able so to do.

Petitioners, (accepting the test as to admissibility which the Circuit Court declares) fairly and clearly tied to the Government's cases the taint of illegality; clearly established that evidence illegally obtained played an important role in trial preparation, in "coaxing witnesses to talk" and in persuading the Grand Jury to indict.

On the hearing in the District Court the Government made no effort to winnow out the good from the evil in the face of *the Casey decision* laying down the test which the Circuit Court has here reaffirmed.

Is it Federal Justice that Petitioners bear the heavy costs and anxiety of the appeal to the Circuit Court and of this proceeding to the end that the Government may discharge its obligation of demonstrating freedom from the taint of illegality upon which obligation it defaulted at the hearing before the District Judge? Does not the presumption prevail that if the Government could

do so it would have done so on the hearing, since *Casey vs. United States* had stated the position of the Ninth Circuit as to how far the protection of Section 605 would be extended where use of radio was involved?

We are frankly appalled at the almost contemptuous disregard for the prohibitions of Section 605 and for the language of this Court demonstrated in this matter.

Accepting the test of *Casey vs. United States* but for the happenchance of a routine form incompletely filled out (R. 47, 48) both recordings would have been at least illegally disclosed; a crime of felony proportions against the United States would have been twice committed instead of once with the concurrence and approval of those charged with enforcing the laws of the United States.

We respectfully submit the petition be granted.

Respectfully submitted,

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OPINION BELOW

The opinion of the Court of Appeals is reported at 226 F. 2d 281. (R. 87 et seq.)

JURISDICTION

The judgment of the Court of Appeals was rendered September 30, 1955 (R. 94). A petition for rehearing was denied November 10, 1955 (R. 96). The petition for a writ of certiorari was filed on December 8, 1955, and granted January 23, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether agents of the Federal Communications Commission are authorized to "wire tap," i.e., intercept and listen to radio communications transmitted by a private farm radio installation without limitation for the purpose of determining if (a) the radio apparatus is being used for the purpose for which it has been licensed by the Federal Communications Commission; or, (b) if the radio installation is being used for any unlawful purpose; and whether, having so listened in on private communications, transcriptions of such intercepted conversations may be divulged by such agents and employed by the Government in a Federal Court in developing witnesses and building a criminal case before the Grand Jury in securing indictments and as evidence on the actual trial of the case so developed.

In the event the foregoing questions are answered in the negative then. (If in the affirmative — this ends this lawsuit)

II. Whether the unintentional failure by the operator of a farm radio-transmitting station to obtain a "perfunctory" permit as such operator frees the communications so made from the protection of Section 605, 47 U.S.C. and in legal effect authorizes agents of the Federal Communications Commission to "wire tap" such communications at the behest of the Department of Justice in aid of an investigation then under way of suspected criminal activity on the part of such operator unrelated to the communications field and renders communications so intercepted admissible in a Federal Court as evidence against such operator.

If the answer to Question II by this Court is contrary to that given by the Circuit Court of Appeals, i.e., is to the effect that such omission does not defeat the public policy expressed in Section 605, the following question becomes moot; otherwise it is for decision.

III. Whether, it appearing without conflict in the evidence that Federal Communications Commission agents had "wire tapped" farm radio communications of petitioners in aid of a criminal

investigation not related to the communications field at a time when both station and petitioners were properly licensed and also at times before petitioners had received their applied-for operators' permits and such intercepted communications were indiscriminately used by the Government before the Grand Jury which indicted petitioners and in trial preparation, the trial judge committed error in suppressing the evidence so obtained and used and dismissing the indictment when the Government, after petitioners clearly tied such use of the illegally intercepted communications into the Government's case, made no offer or effort (a) to disprove that the evidence concededly illegally obtained (by the Court of Appeals) played a substantial part in causing the Grand Jury to indict; (b) to disprove that such evidence so obtained was a substantial factor in the trial preparation of the Government, or (c) to convince the trial court that such illegally intercepted evidence would not be used on the trial of the action and that evidence, free from the taint of illegality was at the disposal of the Government to prove its case.

STATUTES INVOLVED

The pertinent provisions of the Federal Communications Commission Act of 1934, 48 Stat. 1064, c. 652, as amended, 50 Stat. 56, are as follows:

Section 318 (47 U.S.C. 318):

> The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: * * *

Section 501 (47 U.S.C. 501):

> Any person who *willfully* and *knowingly* does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who *willfully* and *knowingly* omits or fails to do any act, matter, or thing in this Act required to be done, or *willfully* and *knowingly* causes or

suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both. (emphasis supplied)

Section 605, (47 U.S.C. 605):

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, § 605, 48 Stat. 1103).

STATEMENT

Petitioners, Robert V. H. Sugden and Jean S. Sugden, husband

and wife, were indicted in the District Court sitting at Phoenix, Arizona, on October 7, 1953, of conspiracy to violate 18 U.S.C. 371 (R. 3 et seq.). Briefly, they were charged with having confederated with certain co-conspirators not indicted to violate 18 U.S.C. 371 by shielding from detection, or so attempting, illegal aliens, i.e., "wetbacks." The conspiracy was to be accomplished, it was charged, through installation of a two-way farm radio in the Sugden home with mobile receiving and sending units in farm trucks. The wife was charged with broadcasting warnings to the drivers of these trucks to the effect that the "redcoats (immigration officers) are coming" thereby enabling the co-conspirators in the trucks to hie themselves to the cotton fields and conceal or attempt to conceal the "wetbacks." Various overt acts were charged including one such act on *September 18, 1953.*

Robert V. H. Sugden was also indicted on the same date (R. 8 et seq.) for a claimed violation of 8 U.S.C. 1324(a)(3) in that he was charged with concealing or attempting the concealment of some 17 wetbacks in separate counts of the indictment. Subsequently all but 5 of these counts were dismissed by the Government. This indictment specifically charged separate acts of concealment on *September 17 and September 18, 1953.* These indictments were consolidated for trial by stipulation.

Petitioners seasonably moved to suppress all evidence gained either directly or indirectly by the Government through certain interceptions of petitioners' radio communications (R. 10 et seq.) and, on the hearing of these motions, the Government conceding that these intercepted communications had been employed before the Grand Jury in securing the indictments of petitioners (R. 61), orally moved in open court that the indictments be dismissed (R. 78, 79). Upon hearing ti. Motion to Suppress these facts appeared:

Petitioner, Robert V. H. Sugden, prior to June of 1953, contacted one Bud Bridges, technician and salesman for Motorola in the Yuma, Arizona, area, (R. 62) with respect to purchasing a two-way radio transmitting apparatus for use on farm vehicles

such as pickup trucks, with the result such an apparatus was purchased from Motorola. Petitioners knew of the outstanding position of Motorola in the radio and electronics field, knew nothing of Federal Communications Commission law or regulations and depended entirely upon Bridges for technical advice. (R. 62, 63, 64, 70, 72) He completed their station license application and such license issued August 26, 1953. (R. 63, 64) Bridges told petitioners operators' permits would be necessary, that no examination was required and that he, Bridges, would take care of securing them. (R. 63, 64, 65, 71) A paper accompanied the station license when received by petitioners which contained, among other statements, one to the effect that operators' permits were held, *or were being obtained*—and petitioners assumed Bridges was taking care of this matter. (R. 65, 71, 72)

After the station license arrived Bridges left some forms, told petitioners to fill them out and send them in. (R. 64) *The station was then in operation and Bridges did not warn petitioners such use would be illegal until their permits arrived.* (R. 65) Petitioners completed the forms and sent them in September 9th, (R. 65) but due to their failure to complete the forms properly they were returned for completion with the result their actual permits were in the hands of petitioners September 17th. (R. 45, 46, 74)

The radio technician for the Yuma County Sheriff, Kieling, who acted as technician for the installation of the unit, testified he made a final check of the station September 8th and told petitioners to finish the completion form when they got their permits and send it in. (R. 76) He further testified he told Robert Sugden in July he could not hook up the *station* because he did not have his *station* license but did tell him how to hook it up himself. (R. 77) The most this witness told petitioners was that he could not fill out their completion report as they did not have their operators' permits. *He at no time warned petitioners not to operate the station until the permits arrived* and the station was openly in operation. While on direct examination (R. 76, 77) he stated

he warned petitioners not to operate the station, on cross-examination he admitted all he told Mrs. Sugden was that he couldn't complete their completion report since the operators' permits had not arrived. (R. 78)

These operators' permits issue as a matter of course without examination if the applicant indicates American citizenship, no felony history and familiarity with the regulations of the Federal Communications Commission. (R. 45, 48) In fact, the Commission can waive issuance of these permits if it finds such to be in the public interest. (Section 318).

The station operated between its location in the Sugden home where Mrs. Sugden operated it along with taking care of her household duties, (R. 71, 72) and mobile units in trucks with the operators of the trucks talking back and forth with the operator in the Sugden home. (R. 4) No operators' permits are required of the person using the unit in the truck to talk with the central station. (R. 69)

On September 4, 1953, Robert J. Stratton, assistant engineer in charge of the Eleventh District Office of the Federal Communications Commission with headquarters in Los Angeles, came to Yuma, Arizona, with equipment designed to intercept and listen to radio communications on direction of the Washington office of the Federal Communications Commission to make an investigation of petitioners' activities by reason of a complaint by the Department of Justice, which in turn was based upon a complaint by the Immigration Service. (R. 34, 35) He contacted the Immigration Service upon arrival and proceeded to listen in on petitioners' conversations by radio. (R. 38, 39) Petitioner Robert V. H. Sugden did not operate the central station and no permits were required of the persons using the mobile unit (R. 69) (unless it be contended as to the conspiracy indictment that the acts of Jean S. Sugden in transmitting signals without a permit were also the acts of Robert as a claimed co-conspirator. It is suggested the failure to seasonably obtain a permit was not an act in furtherance of the claimed conspiracy and played no part therein

and hence such omission being unrelated to the conspiracy would not bring Robert within the familiar rule).

Stratton made notes of this first interception, which were promptly turned over to the Immigration Service. (R. 38) Stratton returned with a partner on the 10th of September and again on the 18th of September upon which two occasions the intercepted conversations were transcribed and copies of such transcriptions promptly turned over to the Immigration Service. (R. 37, 38)

Stratton testified before the Grand Jury as to the substance of each conversation so intercepted and copies were made available to the United States Attorney who used them in confronting and questioning employees of petitioners, some of whom also testified before the Grand Jury which returned the indictments here involved. (R. 40, 41, 42, 43, 61)

The District Judge on the conclusion of the hearing granted the Motion to Suppress and to Dismiss. (R. 22, 23, 24, 25, 79, 80, 81) The Circuit Court reversed, holding the transcriptions made subsequent to the issuance of petitioners' operators' permits were illegally made but those prior thereto were lawfully made and available for use by the Government; the Court apparently did not consider the question as to the obligation of the Government to free its case from the taint of the illegally gained evidence once such use of such evidence by the Government was established.

Petition for Rehearing was denied November 10, 1955. (R. 96)

SUMMARY OF ARGUMENT

Questions I and II

There is no evidence in the record to support even an inference that the failure by petitioners to obtain an operator's license prior to operating the station was other than inadvertent and innocent of wrongful purpose. Such failure in no fashion served the object of the claimed conspiracy or any other wrongful purpose. Petitioners rightfully relied upon the Motorola representative to

guide them and while he advised permits should be obtained he agreed to take care of this detail. The station was licensed and in open operation and he did not warn them not to operate it until their permits arrived. Despite the contention of the Government to the contrary all that Kieling the technician from the sheriff's office told petitioners was to send in the completion forms when the operators' permits arrived. The permits were, as the Circuit Court characterized them "perfunctory;" issued by the Communications Commission as a matter of course on application if the applicant indicated American citizenship, no felony history and familiarity with its rules and regulations. The applications were filed with the Commission September 9th but due to a failure by petitioners to properly mark or check the application form it was returned to petitioners for completion and the permits were not therefore received by petitioners until September 17th.

The purpose of Stratton, the Federal Communications Commission agent, in going to Yuma was not to check to see if petitioners had proper permits—indeed this question was not involved in any respect for the records of the Commission would have readily supplied the answer and, in fact, during the course of the "wire tapping" procedures by Stratton the Commission licensed petitioners as operators. His purpose and that of his superiors in sending him to Yuma was to, in cooperation with the Department of Justice and in direct defiance of the ruling of this Court and the prohibitions of Section 605, intercept and divulge communications without regard to whether or not the operators were licensed; for the purpose of assisting the Immigration Service in making a case against petitioners for conspiracy to conceal aliens.

The history of Section 605 warranted no conclusion that it was not intended to apply to radio for it was a part of the Radio Act of 1927, brought forward into the Communications Act of 1934 (c. 652, 48 Stat. at L. 1063, 1103). This Court had in *Weiss vs. U. S.*, 308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269, applied the sanctions of Section 605 to local or intra-state communications and in *Nardone vs. U. S.*, 302 U.S. 379, 381, to federal officers.

And Section 303(m), which details the causes for which an operator's permit may be revoked, contains no language which indicates that the Congress intended to place a lawful "peeping Tom" at the window and keyhole of every private radio station privileged to lawfully violate the operator's right of privacy so long as the lust of such "peeping Tom" be privately enjoyed.

The Circuit Court weighed in the scales of justice the innocent and inadvertent failure of Jean S. Sugden to at all times hold a "perfunctory" operator's permit before she spoke into the transmitter as against conduct which this Court has denounced as contrary to public policy and inconsistent with ethical standards which conduct was purposely entered into by federal officers and adjudged that an innocent technical oversight outweighs conduct "inconsistent with ethical standards and destructive of personal liberty * * * which involves a grave wrong."

Question III

Petitioners clearly established that the evidence unlawfully obtained by the Government (by the test adopted by the Circuit Court) was used by the Government in building its case against petitioners and in causing the Grand Jury to indict. Indeed, in the conspiracy indictment one overt act is laid as of September 18th when the permits had arrived and the second indictment of petitioner Robert V. H. Sugden laid one count on September 18th. This Court in *Nardone vs. U. S.*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. ed. 307 established the proper procedure under such a state of the record. Yet, despite the fact the Government alone knew to what extent the fruit of the poisonous tree had tainted the indictments and to what extent it would rely upon such tainted proof on the trial, it made no effort to convince the trial court that its proof had an independent origin.

ARGUMENT

Questions I and II

The record affirmatively shows that the Federal Communications Commission, in coming to Arizona for the purpose of inter-

cepting communications between petitioners, did not come here as a part of any routine checkup or other routine discharge of the duties imposed by law on that body. Rather, it was for the purpose of cooperating with the Department of Justice in an attempt to build a criminal case against petitioners (R. 34, 35). The station was then a regularly licensed station with an assigned frequency and there was no claim, or pretense of claim, that the station was not operating properly. Further, a mere routine check of the records of the Commission would have disclosed whether or not in fact the operators had then obtained their permits. At the time when the agent of the Federal Communications Commission intercepted the communications between petitioners on September 18th, the agent then knew (or should have known) that the station was fully licensed and that the operators thereof, petitioners, likewise then held the necessary permits.

We have the situation, therefore, of officers of the United States charged with enforcing its laws acting in almost contemptuous disregard of the provisions of Section 605 of Title 47, U.S.C. herein referred to as the Communications Act.

The Government in the courts below attempted to distinguish the *two Nardone cases* (302 U.S. 379, 82 L. ed. 314, 58 S. Ct. 275, and 308 U.S. 338, 84 L. ed. 307, 60 S. Ct. 266) and the *Weiss case* (308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269) on the basis that there is here involved radio conversations which were intercepted rather than telephone conversations, apparently attempting to draw some distinction due to the difference in the media through which the electrical impulses were transmitted in this case and in the cases above referred to.

The language of Section 605 draws no such distinction. In fact, as this Court noted in *Weiss*, the statutory prohibition against interception of messages and use thereof had existed from the beginning of regulation of radio, but was not extended to telephoned and telegraphed messages until the creation of the Federal Communications Commission and the consolidation of supervision over radio, telephone and telegraph in the Federal Communications

Commission. A casual reading of Section 605 rather effectively disposes of this contention, since there is not the slightest intimation even of intent to differentiate between radioed and telephoned conversations in the statutes. Inferentially, in *On Lee*, 343 U.S. 947, 72 S.Ct. 967, 96 L. ed 1270, this Court recognized that, had radio communications been there involved, Section 605 would apply.

The next position taken by the Government was to the effect that since federal agents made the interceptions as agents of the Federal Communications Commission such interception was lawful. The Government would contend that because the statute authorized the Communications Commission to make expenditures for the construction of monitoring stations and because monitoring stations previously under the control of the Federal Radio Commission were turned over to the Federal Communications Commission when that body was established therefore authority was conferred to exercise nation-wide surveillance over all communications by radio. One might with equal logic argue that since the same statute (Section 154(g)) authorizes the Commission to purchase law books, it thereby invests the Commission with authority to practice law and to hear and decide general litigation between private litigants. A careful reading of the entire act not only fails to disclose any intent to grant such authority to the Federal Communications Commission, but in fact negatives any such intent. This same contention was made in the *first Nardone case* that Section 605 should not be construed so as to hamper agents of the Government in the enforcement of its laws. This Court, however, gave full effect to the language of Section 605 which directs in clear language that "no person" shall divulge or publish the message (intercepted) or its substance to "any person" and said:

> "It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it

less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same consideration may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendment of the Constitution."

Nardone vs. U. S., 302 U.S. 379, 58 S.Ct. 275, 82 L. ed. 314.

It is equally plain that the language of Section 605 above referred to applies to agents of the Federal Communications Commission as well as to agents of all other governmental commissions. Effect cannot be given to the language of the *first Nardone case* above quoted and leave any avenue open for the use of intercepted communications by any agent of the government. If the Congress had intended to permit activities of the nature disclosed by the record, it could, in very simple language, have created an exception to the all-inclusive and broad language of Section 605. Congress did, by proviso, clearly state as to what interceptions of messages Section 605 does not apply, thereby excluding from the application of Section 605 only radio communications broadcast or transmitted for the use of the general public and signals radioed by ships in distress.

Clear it is from the foregoing that Congress had in mind in enacting Section 605 the broad sweep of its language and the question as to what, if any, messages should be exempted from the prohibition contained therein. Having this in mind, the Congress did not see fit to extend authority to the Federal Communications Commission and its agents to intercept and divulge radioed communications, which communications might come to its attention in the routine checking of station frequencies and similar matters entrusted to the supervision of the Federal Communications Commission. The provision of Section 605 here involved applies to interception of any communication *and* divulging the same. Accordingly, even if it be assumed that the Federal Communications Commission in the normal discharge of its supervisory powers might be called upon to intercept messages, none-

theless Section 605 operates to forbid divulging the same to *any* person.

It is, of course, well established that generally speaking, a proviso in its normal usage, makes the general enacting clause of the statute to which it is attached applicable to everything subject thereto not exempted through the proviso.

George Moore Ice Cream Co. v. Rose, 389 U.S. 373, 53 S. Ct. 522, 77 L. ed. 1265

McDonald vs. U. S., 279 U.S. 12, 49 S. Ct. 218, 73 L. ed. 582

White vs. U. S., 191 U.S. 545, 24 S.Ct. 171, 48 L. ed. 295

That the Congress did not intend the Federal Communications Commission to exercise a general supervisory control over all communications made through radio is clearly shown through the express prohibition against any attempt at censorship by the Federal Communications Commission found in Section 326 of the act. As originally enacted in June of 1934, the statute contained a provision making unlawful the use of indecent language in radio communications. By the amendment in 1948 (c. 645, Sec. 21, 62 Stat. 862) this prohibition against the use of indecent language was eliminated and made a separate statutory crime (Sec. 1464 Title 18 U.S.C.) separated from the Communications Act. Certainly, if it had been the intent of the Congress to permit the Federal Communications Commission to exercise a nation-wide supervision over the subject matter of radio communications, here would have been the place for an appropriate reference to that power.

Analyzing the applicable provisions of the act, particularly the portion thereof setting forth the powers and duties of the Commission, we find nothing which even remotely hints at an authorization to the Commission that its agents might intercept communications with impunity for the purpose of determining if the sender be engaged in some unlawful project. Section 303 of the act, which sets forth the powers of the Commission, demonstrates that the powers and duties of the Commission are primarily related to apportioning to applicants the bands and frequencies available,

regulating the power involved and otherwise exercising an administrative control over radio communication. It is true that in *National Broadcasting Co. vs. United States,* 319 U.S. 190, this Court indicated the Commission has powers beyond mere regulation of the engineering and technical aspects of regulation of radio communication. This case, however, involved a broadcasting facility rather than one for private communication and of course under the act as construed with reference to broadcasters, the Commission has much broader powers, since the public convenience is involved. The broadcasting there involved comes within the exception to Section 605 and it cannot be considered as even remotely authorizing what is here contended for by the Government.

Even with respect to the power of the Commission to suspend the license of any operator, Section 303(m), we find nothing to indicate the Congress contemplated agents of the Commission would censor or monitor communications for the purpose of determining if some crime might be in the making. The Congress specified six general causes for which a license might be suspended:

1. Violation of any Act, treaty or convention binding on the United States *which the Commission is authorized to administer* or any regulation made by the Commission under any such Act, treaty or convention;

2. Failure to carry out a lawful order of the master lawfully in charge of the ship or aircraft whereon the licensee is employed;

3. Wilfully damaging or permitting radio apparatus or installations to be damaged;

4. Transmitting superfluous radio communications or communications containing profane or obscene words or language, or knowingly transmitting false or deceptive signals or communications or a call signal or letter not assigned to the station being operated;

5. Wilful or malicious interference with any other radio communications or signals; and

6. Obtaining or attempting to obtain or assisting another in obtaining or attempting to obtain an operator's license by fraud.

It is significant that subdivision 1 above does not extend the power of the Commission to revoke an operator's license for violation of *any* law but *only* for violation of any *Act, treaty or convention binding upon the United States which the Commission is authorized to administer* or for violation of any regulation made by the Commission under any *such* Act, treaty or convention. The use of the word "such" in connection with regulations made by the Commission clearly relates back to limit the word "Act" to such Acts as the Commission is authorized to administer.

Certainly had the Congress contemplated that the Federal Communications Commission was to serve as an arm of the Department of Justice in enforcing our criminal statutes, here would have been the place to authorize it to suspend the license if the operator thereof was using the same in furtherance of some criminal scheme or conspiracy.

Section 303 further gives the Commission authority to *inspect radio installations* which are required to be licensed to ascertain "whether in construction, installation and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, of the conditions of the license or other instrument of authorization under which they are constructed, installed or operated." It is significant that the Congress limited the authority of the Commission to *inspect radio installations,* not to supervise, intercept and monitor all radio communications. Certainly, the intent of the statute contemplates a physical inspection of physical installations. Could a radio installation be "inspected" by intercepting its signals, not for the purpose of determining if it is on its assigned frequency and operating within its assigned power range, but for the purpose of ascertaining, in cooperation with the Department of Justice, if some criminal mischief is afoot? A complete analysis of Section 303

eliminates from consideration the possibility of any intent that Congress intended to grant to the Federal Communications Commission the broad power here contended for. In effect, the Federal Communications Commission would establish itself as a second Bureau of Investigation, and while such ready reaching for new fields of endeavor is not uncommon to federal agencies, before such assumption of power is accepted, particularly when it flies in the face of the plain language of a statute condemning the thing which the agency seeks to do, far more direct and clear language must be found in the statute authorizing it.

Turning now to Section 312, which deals with revocation of a station license or construction permit, we again find nothing indicating any thought on the part of the Congress that the Commission was to supervise the contents of private communications by radio. Certainly, had the Congress contemplated that the Commission would be authorized to freely intercept radio communications some recognition thereof would be found through the grant of authority to revoke a station license if communications were emanating therefrom in furtherance of some unlawful purpose. The five causes for revocation listed are these:

1. False statements knowingly made in the application for a license or in any statement of fact in connection therewith;

2. Conditions coming to the attention of the Commission which would warrant it in refusing a license on an original application;

3. Wilful and repeated failure to operate substantially as set forth in the license;

4. Wilful or repeated violation of or failure to observe any provision of the Federal Communications Act or rule or regulation of the Commission lawfully authorized;

5. Failure to observe any cease and desist order issued by the Commission.

Without torturing the language of the section, no support can be gained therefrom to the idea that the Congress contemplated

general supervision of the contents of all communications by radio by the Commission.

The Government next conjured up in support of its claim to exemption of the Federal Communications Commission from the prohibitions of Section 605 the bogey man of the foreign agent with the short wave radio. The argument is made that if the Federal Communications Commission should learn of this foreign agent broadcasting secret defense information of the United States to his foreign government, it should be permitted to disclose that information to the appropriate authorities. The answer to this contention is that the problem presented by this argument is for the Congress and not for the courts. Equally well might this argument apply to all telephone conversations. The only lawful purpose of any monitoring by the Federal Communications Commission with respect to private radio communications as distinguished from broadcasting is to ascertain if the assigned frequency is being used and the assigned call letters are those employed and the power expended is within the range permitted. Beyond this there is nothing in the act with respect to private radio communication as distinguished from broadcasting conferring any authority upon the Commission. Accordingly, the only legal reason for the monitoring station to listen in, in the sense of listening to the actual conversation, would be if it suspected a foreign agent of employing radio. With equal force we might argue then that if any law-enforcement agency suspected a foreign agent of employing the telephone or transcontinental cable in sending such messages, such law-enforcement agency should be permitted to tap the telephone wires.

Finally, the Government turned to the argument that since during a part of the time the witness Stratton was eavesdropping on the conversations between petitioners, they had not yet received their operators' permits, they were therefore outside the protection of Section 605. It is not disputed that on his first interception the witness Stratton did not have a wire or tape recorder available and only took notes manually, but on the interception September

10th and September 18th, a wire or tape recorder was used (R. 37). These tape recordings played a large part in the matter of inducing the claimed co-conspirators to give statements (R. 50, 51, 53, 54, 59); were used by the United States Attorney in trial preparation and he proposed to use the witness Stratton for the purpose of testifying to the contents of these intercepted messages without reference to whether intercepted September 18th or prior thereto. Plainly the use of the transcriptions taken on September 18th when no question existed as to full qualification of the station and petitioners as operators was so intermingled with the previous interceptions in use both in securing witnesses and evidence, in securing the indictment and for trial preparation that the entire proceeding was tainted from the outset with the "tainted" fruit of the interception which was plainly unlawful.

We respectfully urge the Court of Appeals has overlooked the basic underlying principle which condemns a practice such as here indulged in by the Government; has overlooked the fact that *a mere technical non-criminal omission of these petitioners cannot make something morally right which in its very essence is morally wrong; cannot make something lawful which in its very nature is abhorrent to law and decency.*

The Court of Appeals concluded:

"It seems implicit in the Act that agents of the Federal Communications Commission can do some 'spying' on the air waves, i.e., intercept * * *"

By like course of reasoning, does the Post Office Department have the right to "sample" private mailings to see if perchance some illegal activity is to be found thereby; to do some "spying" to ascertain if non-mailable matter is being transported in violation of the express prohibitions of Section 259a, Chapter 6, Title 39 U.S.C.? By the same line of reasoning as the Court of Appeals applied to radio communications, we reach the unhappy conclusion that our postmaster or letter carrier has carte blanche to open and read our most private correspondence on a "night ride" for

obscenity or crime-inciting matter in the mails. True it is that Section 303(d) authorizes the Commission to revoke the operator's license of one transmitting obscene words but so does Section 259a, Chapter 6, Title 39, U.S.C. (1954 Cum. Pocket Part) authorize the Postmaster to exclude from the mails obscene solicitation matter, and Section 1461, Title 18 requires that non-mailable obscene matter "shall not be conveyed in the mails or delivered from any post office *or by any letter carrier.*" (emphasis supplied)

The purpose of the "wire tapping" was not to ascertain if an unlicensed station was operating or if unlicensed operators were transmitting or if an unassigned frequency was being employed; the purpose was to (in cooperation with the Department of Justice and in direct defiance of said Section 605) intercept and divulge communications *without reference to or regard for* whether the station or the operators were licensed or unlicensed. Indeed, in the course of the "wire tapping" procedures operators' licenses were issued to petitioners, so plainly the Federal Communications Commission and its officials were not concerned with this phase of petitioners' activities.

Weighing then in the balance of propriety the simple oversight of the petitioners to obtain a "perfunctory" permit against the purposeful, deliberate disregard of a statute of the United States and the denunciations of this Court of "dirty business" in law enforcement, can it be said the trial court should have countenanced such conduct?

This is not evidence stumbled upon in the course of a lawful discharge of duties imposed by law upon the Federal Communications Commission; *this is evidence purposefully sought out in direct defiance of law.* Would it be said that because one operating an unlicensed motor vehicle upon the highway without an operator's license thereby becomes subject to unlawful search and seizure because he is unlawfully upon the highway and had no right to be driving the vehicle? Would the Government contend the police authorities might arbitrarily stop all motorists and

search their vehicles with the legality of such action turning upon the chance of the presence or absence of a driver's license in each instance?

We respectfully urge that the technical and innocent oversight of petitioners in failing to properly fill out a form for a "perfunctory" permit does not make them "outlaws of the ether highways," shorn of all the rights of a citizen of the United States, to be "shot on sight" by Federal Communications Commission agents stalking them, not as unlicensed operators of communications equipment and for that delinquency, but in cooperation with the Department of Justice and the Immigration Service for the claimed offense of concealing aliens—a matter generally accepted as somewhat beyond the jurisdiction of the Federal Communications Commission.

We believe we might rely upon the rule laid down in the *second Nardone case* to the effect that an unlawful interception and its use being shown by the defendant, the Government then must convince the trial court that it has an independent source of evidence necessary to convict as apparently correctly construed and applied in *U. S. vs. Coplon,* 185 F. 2d 629 C.C.A. 2, Cert. denied, 72 S. Ct. 362, 342 U.S. 920, 96 L. ed. 690.

But we cannot agree with the Government's contention that the mere lack of a purely formal permit, occasioned through lack of experience and through reliance upon the guidance of one whose experience and position warranted such reliance, can operate to overturn the protection intended by the Congress in enacting Section 605—can defeat a public policy bottomed upon considerations of ethics and morality.

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in Nardone v. United States, supra. That decision was not the product of a merely meticulous reading of

technical language. *It was the translation into practicality of broad considerations of morality and public well-being.* This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 303 US 379, 384, 82 L ed 314, 317, 58 S Ct 275. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' * * * " (emphasis supplied)

Nardone vs. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L. ed. 307

Here the station was licensed, there is no claim of any improper physical operation of the station and the failure to obtain the formal permit required was not wilful or intentional. Certainly there is nothing malum in se in the failure of petitioners to check the proper places on the application and send it in for issuance administratively of a simple permit. No public safety is involved —no loss of public funds derived from the licensing of applicant adds to the seriousness of the omission. It was a pure oversight innocently occasioned to complete a mere formal application and yet the Government would attach to it the gravest consequences and contend that thereby petitioners lost the protection of Section 605, a statute enacted to establish a rule of evidence based upon public policy and considerations of ethics and morality.

If Section 501 (general penalty provisions) applies to the use of the station by petitioners prior to securing their operators' license, it could only become applicable upon a showing that the petitioners so operated their station "wilfully and knowingly" and the record is overwhelmingly against such a conclusion. If petitioners cannot be found to have violated the penal provisions of the Act, then certainly the position of the Government, in effect making them outlaws, fair game for any over-zealous law enforcement officer, is not sound.

Question III

Should the conclusion reached by the Court of Appeals as to

the effect of the failure of Jean S. Sugden to hold an operator's license be found unsound, then a consideration of this question becomes unnecessary, since all involved intercepted communications would perforce have been unlawfully come by by the Government.

There is no argument but that, tested by the judgment of the Court of Appeals, Stratton unlawfully intercepted the conversations of September 18th. The station was licensed; both petitioners then had their permits.

There is no conflict in the evidence that petitioner Robert V. H. Sugden did not operate the central station; his use was in the field on the mobile end of the equipment installation where a permit was not required and the station used was at all times fully licensed.

There is no conflict in the evidence as to the fact that Stratton related this conversation of September 18th to the Grand Jury, a transcription thereof was supplied to the Immigation Service and the United States Attorney and was used in interrogating witnesses, as the Court of Appeals says:

> "In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before trial, the government was materially aided by the fact one Robert J. Stratton * * * had come into the Yuma area with monitoring devices."

and that the Government proposed to use the various transcriptions on the trial of the cause.

Petitioners seasonably moved to suppress all of these transcriptions and related evidence.

Petitioners, pursuant to the rule laid down by this Court in *Nardone vs. U. S.*, 308 U.S. 338:

> "* * * A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first in-

stance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

as interpreted by the Second Circuit in *the Coplon case*, supra, clearly established that substantial evidence condemned as illicitly obtained by the test as to illegality established by the Court of Appeals in its opinion, was employed by the Government before the Grand Jury in securing the indictments quashed by the District Judge and in preparing its case against petitioners; and further, that it would use such evidence on the trial of the cause. These facts appearing to the satisfaction of the District Judge, we respectfully urge the burden fell upon the Government to satisfy the District Judge:

(a) That the indictments were untainted by the use of such unlawful evidence;

(b) That such evidence, so unlawfully obtained, did not play any substantial part in building the Government's case, directly or indirectly;

(c) That the evidence which the Government proposed to offer on the trial of the cause was obtained from independent sources untainted by and not traceable to such unlawful interception and divulgence.

Accepting for the purpose of this argument the distinction drawn by the Court of Appeals between communications sent by an unlicensed operator and a licensed operator, it is clear that there were two recordings made by Stratton, one when the operator's permit was in effect, one when such permits were only applied for. *The Government knew which of these transcriptions it had employed in building its case and in obtaining these indictments. It knew which of these it proposed to use on the trial of the action. These petitioners were not so advised.*

Overt Act No. 5 of the Indictment for conspiracy charges the September 18th use of the radio as an act in furtherance of the conspiracy so conclusively the transcription of this date was presented to the Grand Jury. Count 18 of the Indictment of Robert V. H. Sugden is apparently likewise based upon this transcription.

The rule which the Court of Appeals has declared as to the effect of the lack of proper licenses for use of radio communications equipment had been theretofore declared by the Ninth Circuit in *Casey vs. U. S.*, 191 F. 2d 1, and was known to the Government. In *Casey* the Ninth Circuit denied the protection of Section 605 to unlicensed operators of unlicensed radio equipment and, while a very casual opinion insofar as it decided this question nonetheless was the law of the Circuit.

Yet the Government made no effort or offer to show that the indictments were untainted by this unlawful evidence or that it could proceed with lawful evidence arising from a lawful source.

Stratton testified that he did in fact relate the entire interception procedure to the Grand Jury:

"A. Well my testimony was a running account of what had happened from the time we were first called in on the case." (R. 40)

* * * * * *

"Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

"A. That is correct, the general use of the radio in that particular case." (R. 41)

How could the District Judge remove this taint from the indictment; how could he ascertain what effect the unlawful testimony had upon the minds of the Grand Jurors?

Clearly as to the petitioner Robert V. H. Sugden *all* intercep-

tions were unlawful, since he at no time was acting as operator of the station, so under any interpretation of the facts and law—unless the Federal Communications Commission is free to "spy" as it chooses—the action of the trial judge was correct.

The net effect of the ruling of the Circuit Court, if affirmed, will be to send the cause back to the District Court to permit the Government to do what it should have done in the first place, if it is able so to do.

Petitioners, (accepting the test as to admissibility which the Circuit Court declares) fairly and clearly tied to the Government's cases the taint of illegality; clearly established that evidence illegally obtained played an important role in trial preparation, in "coaxing witnesses to talk" and in persuading the Grand Jury to indict.

On the hearing in the District Court the Government made no effort to winnow out the good from the evil in the face of *the Casey decision* laying down the test which the Circuit Court has here reaffirmed.

Is it Federal Justice that petitioners bear the heavy costs and anxiety of the appeal to the Circuit Court and of this proceeding to the end that the Government may discharge its obligation of demonstrating freedom from the taint of illegality upon which obligation it defaulted at the hearing before the District Judge?

Accepting the test of *Casey* but for the happenchance of a routine form incompletely filled out (R. 47, 48) both recordings would have been illegally made and disclosed; a crime of felony proportions against the United States would have been twice committed instead of once with the concurrence and approval of those charged with enforcing the laws of the United States.

CONCLUSION

The judgment and opinion of the Circuit Court should be

vacated and reversed and the Orders of the District Court for the District of Arizona should be reinstated and affirmed.

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No. 555

In the Supreme Court of the United States

October Term, 1955

[redacted]

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BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 555

ROBERT V. H. SUGDEN AND JEAN S. SUGDEN, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 87–94) is reported at 226 F. 2d 281.

JURISDICTION

The original judgment of the Court of Appeals was rendered on September 30, 1955 (R. 94–95) and an order modifying such judgment was filed on November 10, 1955 (R. 95). A petition for rehearing was denied on November 10, 1955 (R. 96). The petition for a writ of certiorari was filed on December 8, 1955, and was granted Janu-

ary 23, 1956 (R. 96). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in carrying out its duty to enforce the provisions of the Communications Act of 1934, the Federal Communications Commission may legally monitor transmissions by an industrial radio station.

2. Whether, when in the course of such monitoring it is discovered that a station is being used as a means of violating federal criminal laws, information concerning such violations may be disclosed to appropriate federal officers and used by them as evidence.

3. Whether Section 605 of the Communications Act, forbidding interception and divulgence or use of radio communications, has any application to transmissions by an unlicensed operator for an unauthorized purpose.

STATUTE AND REGULATIONS INVOLVED

The following provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, are directly involved:

> Section 303 (n) (47 U. S. C. 303 (n)):
>
> *Powers and duties of Commission.*
>
> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

* * * * *

Section 318 (47 U. S. C. 318):

Transmitting apparatus; operator's license.

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: * * *

Section 605 (47 U. S. C. 605):

Unauthorized publication or use of communications.

* * * * *

and no person not being authorized by the sender shall intercept any communication

> and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; * * *.

Additional sections of the Communications Act of 1934 and of the Regulations thereunder are set forth in the Statement, *infra*, pp. 12 to 17, and in Appendix A, *infra*, pp. 63 to 70.

STATEMENT

On October 7, 1953, two indictments were returned against petitioners in the United States District Court for the District of Arizona (R. 3-10). The first indictment charged that between August 23, 1953, and September 18, 1953, petitioners conspired with other persons to violate 8 U. S. C. 1324 (a) (3) relating to the harboring of aliens illegally within the United States. The object of the conspiracy was alleged to have been accomplished as follows (R. 4):

> The defendant Robert V. H. Sugden did cause to be installed in his home two-way radio equipment, from which his wife, Jean S. Sugden, did, at various times during the conspiracy dates as hereinbefore set forth, broadcast to radio equipped mobile units driven by defendant Robert V.

H. Sugden and co-conspirators Robert Sommers, George Matthews, Horace Billingsley, Beal Billingsley and Lawrence Gerhart warnings that Immigration officers were en route to cotton fields where the aforementioned described aliens were working, whereupon the aforementioned defendant and co-conspirators, who were driving the mobile units, would proceed to the cotton fields and conceal and shield from detection, and attempt to conceal and shield from detection, the aforementioned described aliens from Immigration officers.

Nine overt acts were alleged involving individual incidents of such activity (R. 4–7).

The second indictment contained five counts, each alleging a separate substantive violation of 8 U. S. C. 1324 (a) (3) during the same period.[1]

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[1] In two additional indictments not directly involved in this case the petitioners were charged with violations of the Communications Act by reason of their operation of a radio station without operators' licenses and in violation of the terms of the station license. See Appendix C, *infra*, pp. 79–91.

In addition, proceedings dealing with the revocation of petitioners' station license and suspension of their operators' permits were initiated by the Federal Communications Commission in October and November 1953, as a result of evidence of their illegal operations. Subsequently, the Sugdens having surrendered their operators' permits and the station license for cancellation, the Commission cancelled them on October 14, 1954. *In the Matter of Jean S. Sugden and Robert V. H. Sugden*, F. C. C. Docket Nos. 10780, 10781, 10740. See Appendix B, *infra*, pp. 71–78.

A. THE MOTION TO SUPPRESS AND DISMISSAL OF THE INDICTMENT

Prior to trial, petitioners moved to suppress evidence which had been obtained through the monitoring of their industrial radio facilities by engineers of the Federal Communications Commission and which had subsequently been given to the Department of Justice for use in these prosecutions (R. 10–13). At the preliminary hearing the following evidence was adduced:

Sometime in June, 1953, petitioners placed an order through one Bridges, a Motorola salesman, for two-way radio equipment to be used on their cotton farm located about nine miles south of Yuma, Arizona, close to the Mexican border (R. 41, 62, 70–71). According to the petitioners, Bridges indicated that he would take care of procuring a station license and he had petitioner Robert Sugden execute a Federal Communications Commission form of application for a Special Industrial Service license (R. 63, 70–71) to permit him to operate a base station from his home to be used in two-way communications with mobile units (pick-up trucks, tractors and plows) operating on his farm. (R. 67).

On August 26, 1953, after the base set was installed, petitioners obtained their Federal Communications Commission station license (R. 64, 71). The license bore the following notation (R. 67):

> Applicant is engaged in the activities of general farming, land clearing, insect control and cultivation. Two-way radio is proposed for use on farm vehicles, such as pickup trucks, tractors, and plows.

The license as granted included the following "Conditions" (Govt. Ex. 3):

> A. Subject to the provisions of the Communications Act of 1934, subsequent acts, treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions and requirements set forth in this authorization (including those contained on the reverse hereof) the licensee or permittee hereof is authorized to use and operate the radio transmitting facilities herein described. This authorization shall not vest in the licensee or permittee any right to operate the station nor any right in the use of the frequencies designated in the authorization beyond the term hereof, nor in any other manner than authorized herein.
>
> * * * * *
>
> C. This authorization is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained, so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such service as will serve public interest, convenience, or necessity to

the full extent of the privileges herein conferred.

* * * * *

Toward the end of August petitioners were told by Bridges that they would need operators' permits, and he offered to procure the necessary forms (R. 71–72, 74). Petitioners, however, commenced to operate the two-way base station without such permits during the latter part of August (R. 65, 72). When a radio technician employed by petitioners visited the station on September 8, 1953, to make a final frequency and modulation check, he told petitioner Jean Sugden that he could not finish the completion form until they, the Sugdens, procured their operators' permits. The radio technician gave her the operator's permit application forms and told her to fill them out (R. 76–78).

On September 9, 1953, applications for operators' permits were received in the Los Angeles office of the Federal Communications Commission from the petitioners, but were returned with mimeographed instructions informing them that the applications were incomplete (R. 46–48). On September 17, 1953, permits were issued and sent to the Sugdens by the Federal Communications Commission from Los Angeles (R. 46–47). The record does not show when these were received. Although such permits are issued without the applicant's being required to pass an examination, he must indicate on the rear of the application

that he is "completely familiar with the rules and regulations" of the Commission (R. 48).

Meanwhile, the Assistant Engineer in charge of the Eleventh District Office of the Federal Communications Commission Headquarters in Los Angeles, California, Robert J. Stratton, received a complaint from the Department of Justice, through the Federal Communications Commission in Washington, D. C., of a possible illegal use of radio in the Yuma, Arizona area (R. 34).[2]

On September 4, 1953, on the basis of this complaint, Stratton went alone to Yuma for the day (R. 35) "to confirm that the radio was being used for a purpose other than authorized." He took with him a direction finder and monitoring equipment with which he could listen to radio conversations (R. 34). When he arrived in the Yuma area, he tuned in on the frequency assigned petitioners and took notes of the conversations (R. 37).

On September 9, 1953, Stratton and another engineer, each driving an automobile equipped with direction finders, went to the Yuma area and spent two days there, during which they again monitored petitioners' station and placed its location through the triangulation method (R. 35, 40). The monitoring was done usually during periods

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[2] The complaint originated, apparently, from immigration officers stationed in Yuma, Arizona (R. 38), who had some undisclosed information about the operation of an illegally operated radio but did not know its location (R. 40).

when the farm personnel were active in the fields. At other times when the two-way equipment was not in use, the engineers monitored the assigned frequency to detect whether petitioners' station might be interfering with "out of state signals" (R. 38). The station was capable of covering a 70-mile radius, an area which extended into California and Mexico (R. 44), and as they monitored at times they were within 75 feet of the Mexican border (R. 43). The radio conversations on this and a subsequent trip were transcribed by portable tape recording (R. 37).

On September 18, 1953, Stratton returned to Yuma, and apparently again monitored petitioners' station frequency (R. 35, 36, 37). He made a routine inspection of petitioners' station and met with petitioners in their home (R. 36). He left with them a copy of the printed rules and regulations of the Federal Communications Commission (R. 37).

Stratton's notes and records were forwarded to Washington and were made available to the Immigration and Naturalization Service (R. 37–39). He appeared before the grand jury which returned the present indictments and testified generally as to the monitored communications (R. 40). He also discussed the communications with the United States Attorney in charge of the instant case (R. 42–43). The government's questioning of petitioners' former employees also

involved the use of the monitored communications (R. 49–51, 52–54, 58–59).

The district court ruled that all of the evidence and information obtained by monitoring should be suppressed. It then dismissed the indictments as having been "tainted" by use of the "illegally obtained information and evidence" before the grand jury (R. 22–23).

On the government's appeal from the dismissal of the indictment, the court of appeals stated that, although monitoring of radio communications by engineers of the Federal Communications Commission for Commission purposes is lawful and information so obtained can be used for enforcement of the Federal Communications Act, nevertheless such information cannot ordinarily be used for criminal prosecutions unrelated to enforcement of that Act. The court held, however, that where, as here, the radio facilities are being used by unlicensed operators, such transmissions are outside of the protection of Section 605 of that Act. Since the district court had made no distinction between communications monitored before September 17, 1953 (the date the court of appeals assumed that the petitioners became entitled to operate)[3] and those on September 18,

[3] This assumption is subject to some doubt since the record indicates that the operators' permits were not issued from the Federal Communications Commission office in Los Angeles, California, until September 17, 1953 (*supra*, p. 8), and the regulations of the Commission require that an operator's permit be either in the personal possession of the

1953, the court of appeals reversed the orders dismissing the indictments and suppressing the evidence, and remanded the case for further proceedings not inconsistent with its opinion (R. 87–95).

B. THE REGULATIONS

The problems in this case must be considered in the light of the regulatory scheme applicable to the particular radio facilities involved, which are here generally outlined.

The station licenses issued to the petitioners, for the operation of a two-way radio on their farm, were issued under the general provisions of Part 11 of the Federal Communications Commission Regulations pertaining to "Industrial Radio Services", and especially Subpart K pertaining to "Special Industrial Radio Services". See: 47 C. F. R. [1953 ed.] 11.501. The basis and purpose of the station licensing power under Part 11 is set forth as follows (*Ibid.*, 11.1):

* * * * *

> (b) The purpose of the rules in this part is to prescribe the manner in which parts of the radio spectrum may be made available for radio communication and control facilities to various industrial enterprises which, for safety purposes or other necessity, require radio transmitting facilities in order to function efficiently.

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operator or posted near the transmitter when in operation (see *infra*, p. 16).

A regulation entitled *"General limitations on use"* provides (*Ibid.*, 11.2):

> *General limitations on use.* The radio facilities authorized under this part *shall not be used to render a communications common carrier service* or to carry program material of any kind for use in connection with radio broadcasting. [Italics supplied.]

Industrial station frequencies are allocated to "services" rather than to individuals as such, and no licensee is given the exclusive right to the private use of his assigned frequency or to use it for any purpose other than that for which the license has been assigned. When the station license is awarded, the licensee is assigned one of a limited number of special frequencies of the radio spectrum allocated to industrial use which his station must share with other "party line" stations operating in the area and frequently performing the same kind of occupational function. See *Ibid.*, 11.8:

> *Policy governing the assignment of frequencies.* (a) The frequencies which may be assigned to stations operating in any one of the several Industrial Radio Services are listed in the applicable subpart of this part. All applicants for, and licensees of, stations in these services shall cooperate in the selection and use of the frequencies assigned in order to minimize interference and thereby obtain the most effective

use of the authorized facilities. Ea
frequency, or band of frequencies, ava
able for assignment to stations in the
services is available on a shared basis on
and will not be assigned for the exclusi
use of any one applicant: such use ma
also be restricted to one or more specific
geographical areas.

And see *Ibid.*, 11.502, listing the frequencies par
ticularly allocated to Special Industrial Radi
Service licensees on a "shared" basis. The de
termination as to which frequency a particular
station must operate on is made with reference to
the service for which the station is to be used.

The purpose for which a station licensee may
send radio communications over the particular
frequency for which permission has been granted
is strictly limited to the precise function stated in
the license except in emergency situations. See
Ibid., 11.151:

> *Permissible communications.* (a) Stations licensed under this part may transmit the following types of communications:
>
> (1) Any communication related directly to the safety of life or the protection of property; and
>
> (2) Communications considered essential to the efficient conduct of that portion of the enterprise for which the licensee is eligible to hold a station license under this part, subject to the condition that harmful interference is not caused to safety com-

> munications of stations licensed under this part.

All such calls are restricted to the "minimum practicable transmission time" (*Ibid.*, 11.151 (d)), and each station must identify itself at the end of each transmission or exchange of transmission or once each fifteen minutes of the operating period. *Ibid.*, 11.152.

Prior to operation, the industrial radio station is required to be licensed. See *Ibid.*, 11.51:

> *Station authorization required.* No radio transmitter shall be operated in the Industrial Radio Services except under and in accordance with a proper station authorization granted by the Federal Communications Commission.

The procedural steps for obtaining authorization are set forth in detail. See *Ibid.*, 11.51–11.66. In addition to the station license, the operator of a base station transmitting to mobile units as in the instant case must have a valid operator's license or permit. See *Ibid.*, 11.154 (e) (1).

> From a control point, only a person holding a commercial radio operator license or permit of any class issued by the Commission shall operate a base station or fixed station.

Ibid., 11.154 (h) provides:

> The provisions of this section authorizing certain unlicensed persons to operate mobile stations shall not be construed to

change or diminish in any respect the responsibility of station licensees to have and to maintain control over the stations licensed to them (including all transmitter units thereof), or for the proper functioning and operation of those stations (including all transmitter units thereof) in accordance with the terms of the licenses of those stations.

And see also *Ibid.*, 11.155:

Posting of operator license. (a) The original license of each base or fixed station operator, other than an operator exclusively performing service and maintenance duties, shall be posted or kept immediately available at the place where he is on duty as an operator: *Provided, however,* That if an operator who is on duty holds a restricted radio-telephone operator permit of the card form (as distinguished from such document of the diploma form) or holds a valid license verification card (FCC Form 758–F) attesting to the existence of any other valid commercial radio operator license, he may have such permit or verification card, as the case may be, in his personal possession.

* * * * *

(c) The original license of every station operator who exclusively performs service and maintenance duties at that station shall be posted at the transmitter involved whenever the transmitter is in actual operation while service or maintenance work

is being performed by him or under his immediate supervision and responsibility: *Provided,* That in lieu of posting his license, he may have on his person his license or a valid verification card.

SUMMARY OF ARGUMENT

Although petitioners present their case as though the Federal Communications Commission had been used as a detective agency by other branches of the federal government to secure evidence of criminal acts unrelated to its functions (Pet. Br. 2, 9, 11), the record demonstrates without contradiction that the Commission engineers in fact carried through the monitoring operation here in question in order to ascertain whether or not radio facilities were being used for an unauthorized purpose in violation of the Communications Act. (R. 35.) Both administrative and criminal sanctions for violation of that Act have ensued (*supra,* p. 5, fn. 1). The case therefore involves the issue of whether the Commission has authority to monitor to carry out its duties to supervise the use of the radio spectrum, and whether evidence of other crimes it obtains while so engaged may be used in the prosecution of the operators of the station for violation of other federal laws. It is the government's position that the court below took a too restricted view of the use which may be made of such evidence and that its conclusion may be supported by a broader view on that issue as well as

on the grounds it did adopt. On the separate question of whether the prohibition against listening to, and disclosing or using, radio messages is applicable to unauthorized radio emissions, we agree with the position of the court below that it is not. It is our position, however, that the use of petitioners' station was unauthorized not only because the requisite operator permits were lacking, but also because the station was not being used for the limited purpose for which it had been licensed, but to effectuate a criminal act.

I

Petitioners' claim that the monitoring operation was illegal is based upon Section 605 of the Communications Act of 1934 (47 U. S. C. 605) which prohibits the unauthorized interception and divulgence or use of radio communications. However, if Congress not only authorized but required the Commission to monitor radio communications, it is apparent that it could not have intended Section 605 to apply to such monitoring.

In Section 303 (n) of the Act (47 U. S. C. 303 (n)), Congress places the duty on the Commission to inspect all radio installations to determine whether they have been constructed and are being operated in accordance with the law and regulations and the terms of their licenses. Inspection of radio facilities for these purposes requires listening as well as looking. In fact many of the requirements of the Act and regulations can be

enforced only by monitoring, as for example requirements as to the physical properties of the signal (Sec. 303 (c)), the geographic coverage and limitations of the signal (303 (h)), interference (Sec. 303 (f)), compliance by operators with limitations on their right to use the air (Sec. 303 (m)), compliance with limitations on use in a station license (Sec. 303 (b)), and prohibitions against certain anti-social uses of stations (Sec. 303 (m), 325 (a)).

Moreover, Congress, prior to, coincidentally with, and subsequent to, the reenactment of Section 605, recognized the propriety and necessity of monitoring by making reference to it as an accepted function of the Commission (Section 4 (f) (3), 4 (g), 603 (b)). Annually, the Commission has requested funds for monitoring and, annually, funds have been specifically appropriated for that purpose.

The courts have had little opportunity to interpret Section 605 in relation to monitoring activities by the engineers of the Federal Communications Commission. None of the "wire-tapping" cases in this Court deals with this aspect of the problem. Each of them deals with the interception of wire communications which the parties had every reason to believe were private, a far different situation from radio communications which by their nature can be heard by many people.

The inapplicability of Section 605 to Commission monitoring activities is dramatically illus-

trated by the near-absurdity of applying it to the operations of petitioners' radio station. The station was to be used not to transmit messages for others, but as part of petitioners' farming activities, and for that purpose only. The frequency granted was, under the regulations, a frequency shared with others, so that all communications made over it would be heard not only by the curious idle, but also by others licensed to use that specific frequency. Since the regulations (a copy of which applicants certified they had) require inspection, petitioners were in the position of users of a third class mailing privilege who invite inspection by the postmaster and then complain because the invitation is accepted. Moreover, a license of a shared portion of the radio spectrum particularly requires the monitoring of message content since the crowded condition of the air requires strict adherence to the limitation on its use.

Far from being a "dirty business," the monitoring of radio facilities by Commission engineers is authorized by law, invades no rights of privacy, and is absolutely essential to enforcement of the limitations imposed on radio stations and operators by law and regulations.

II

The court below stated its belief that the right to monitor in the course of enforcement of the Communications Act did not make evidence so

obtained admissible in a prosecution for violation of some other federal law. No authority is cited for this proposition and we believe it is inconsistent with the principle that once evidence comes into possession of a federal officer legally, he may use it for all purposes.

In *Nardone* v. *United States,* 302 U. S. 379, and *Weiss* v. *United States,* 308 U. S. 321, this Court imposed a court-made limitation on the use of illegally obtained information as evidence. Basically this, like the rule in *Weeks* v. *United States,* 232 U. S. 383, was an attempt to discourage illegal activity by making it unprofitable. If we are right in our first point, namely, that monitoring for Commission purposes by Commission engineers is not only not illegal but is a duty, there is no occasion for a court-made rule to discourage it.

There is a strong analogy between the situation here and the search and seizure issue in *Harris* v. *United States,* 331 U. S. 145, which stands for the proposition that where police officers are engaged in making a lawful arrest, evidence found relating to an entirely separate crime is not illegally obtained. This case is also somewhat analogous to *Zap* v. *United States,* 328 U. S. 624 (reversed on another ground, 330 U. S. 800), where in the course of a legal inspection by government auditors, consented to by the petitioners, evidence of fraud against the government was discovered in form of a check which

the government agent retained in his possession. This Court found it admissible. But the present case is stronger since the element of "seizure" emphasized in the dissent in *Zap* is not here present.

III

The government's last point is an alternative ground to what goes before. Even if it should be held here, as it was below, that information obtained by monitoring duly licensed and legal radio operations may not be used in evidence in a criminal case, this protection should not be extended to communications by an unlicensed operator who exceeds the limited authority of his station license.

There is no dispute that no operator's permit had been obtained by either of the petitioners prior to the first two monitoring operations. The law and regulations require that the operator of a radio station such as that here involved have a permit. These messages were, therefore, illegally on the air.

But, furthermore, with respect to all of the messages monitored, they were not authorized because they exceeded the limited authority granted petitioners in their station license. Only essential messages concerning petitioners' farming operations were authorized. Once they went beyond this into the illegal field of frustrating the immigration law they were no better than an

unlicensed station with no right on the air at all. Just as the attorney-client privilege is torn away when it is used to cloak crime or fraud (Cf. *Clark* v. *United States*, 289 U. S. 1; *United States* v. *Bob*, 106 F. 2d 37 (C. A. 2), certiorari denied, 308 U. S. 589; *Regina* v. *Cox* [1884] 14 Q. B. D. 153), so whatever right to privacy exists in radio transmission on a shared frequency was lost when petitioners exceeded their licensed authority. As this Court has held (*Goldman* v. *United States*, 316 U. S. 129, 133), it is the means of communication which Section 605 is designed to protect, not the messages which are transmitted. There is no public interest in protecting an unlawful use of a station license by an operator who has no license.

ARGUMENT

At the outset, we think that it is well to point out that petitioners' brief is largely founded on the erroneous assumption that the Federal Communications Commission and its employees had no concern under the Communications Act and regulations in the illegal operation of petitioners' radio, but that the motive in monitoring was to obtain evidence "of suspected criminal activity on the part of such operator unrelated to the communications field" (Pet. Br. 2), "for the purpose of assisting the Immigration Service in making a case against petitioners for conspiring to conceal aliens" (Pet. Br. 9), and "in an attempt to build a criminal case against petitioners" (Pet.

Br. 11). The record establishes, to the contrary, that Stratton's purpose in going to Yuma, after receiving information through the Department of Justice that an unlocated and unidentified radio was being used illegally, was "to confirm that the radio was being used for a purpose other than authorized" (R. 35). The administrative action taken by the Commission for violations of the Federal Communications Act and the criminal proceedings based on violations of that Act strongly confirm this. See *supra*, p. 5, fn. 1. Certainly, the Commission's personnel were not barred from investigating violations of, and enforcing, the conditions of petitioners' limited license because the violations also involved crimes not related to the communications field.[4]

This case, therefore, in its broad aspect, presents the problem of the extent to which the Federal Communications Commission may, within the limitations of Section 605 of the Communications Act (47 U. S. C. 605), in the exercise of its function to regulate the varied and changing uses of the crowded radio spectrum, monitor radio transmissions and use the information so acquired. On this broad issue, which we discuss first, it is

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[4] In pointing out that in this case the Commission was monitoring in connection with its functions under the Communications Act, we do not mean to reflect one way or the other on its authority to monitor for other law enforcement purposes; such a situation is not presented by the facts of this case.

our position that the Communications Act authorizes, and the Commission's statutory regulatory duties require, its employees to monitor radio transmissions, especially radio operations under a special industrial service license authorizing transmissions for limited purposes on a frequency shared with many other users. The government then argues—and to this extent it disagrees with the court below—that where information acquired by the Commission in the course of authorized monitoring discloses the commission of a crime, that information can be "divulged" or "used", not only for the purposes of enforcing the Communications Act, but for the enforcement of criminal laws unrelated to the administration of that Act.

The actual holding of the court below presents a narrower problem. The court held "that as to private radio communications, before any right of privacy exists under Section 605 the voice must be legally on the air; otherwise one who hears, and especially the Federal Communications Commission, may make full disclosure" (R. 93). While we fully agree with this statement, we do not accede to the assumption of the court that the issue of whether petitioners were legally on the air depends only on whether they had operators' permits at the time of the monitoring. Whether they were legally on the air depends also on whether they were transmitting pursuant to the authority vested in them by the Communica-

tions Act and the terms of their station and operators' licenses. The illegality here arose not only from the fact that, with the possible exception of one day, petitioners were operating their radio station without operators' permits, but also from the fact that at all relevant times petitioners were acting completely outside of the authority of the Communications Act, the Commission regulations, and the limited authority granted by their industrial station license. They were using a radio station, licensed only to send business communications essential to their farm operation, to send illegal warning signals to alien farm workers, in itself a criminal activity. For these reasons, the protection of Section 605 was not available to petitioners.

If the government's position is correct, either on the broad or on the narrow ground, the evidence obtained from all of the monitoring operations, before and after the operators' permits were received, should be available for all purposes. Therefore, if this Court accepts the government's argument, the directions of the court below to the trial court to reexamine the evidence in order to separate that which was acquired after the permits arrived will presumably be unnecessary. Since the government did not petition for certiorari, we do not ask the Court to modify the decree of the court below. However, if the government does prevail, it may be appropriate for it to move the court below to

modify its order after the case is disposed of here.[5]

I. THE FEDERAL COMMUNICATIONS COMMISSION ENGINEERS WERE AUTHORIZED BY LAW TO MONITOR COMMUNICATIONS OVER PETITIONERS' RADIO STATION IN ORDER TO ENFORCE THE COMMUNICATIONS ACT

A. THE COMMISSION IS AUTHORIZED AND REQUIRED TO MONITOR RADIO STATIONS IN ORDER TO CARRY OUT ITS REGULATORY FUNCTIONS

Almost from the start of regulation of radio by the federal government, monitoring has been recognized as the only practicable method of supervising the use of the airwaves. Unlike the problems involved in regulating wire communications, the supervision of radio has always required inspection, not only of the transmitting and receiving equipment employed, but also of the emissions that radio stations send out. Since radio stations must of necessity operate in a

[5] Petitioners argue as a separate point (Pet. Br. 22–26) that, since the government has not seen fit at a prior stage to separate the significance of information obtained on the last day of monitoring, the indictment was properly dismissed. It is asserted that the use of the inadmissible evidence poisons the entire proceeding in the absence of a showing by the government that the grand jury acted independently of it, and that the government has not even attempted to make such a showing. However, to us it seems clear that the government was not called upon to establish such a separation of the good from the bad until there was a final adjudication on its contention that all of the evidence was admissible. Therefore, even if petitioners could escape on the basis of laches or waiver by the government, such a theory has no basis in fact in this case.

densely crowded radio spectrum, it is imperative that Commission technicians have constant access to the airwaves to detect deviations from frequency and power requirements as set forth in the regulations and in station licenses, situations resulting in interference, the quality of emissions, and instances of either unlicensed operation, or operation in violation of the authority given. See The Twenty-First Annual Report of the Federal Communications Commission for Fiscal Year ending June 30, 1955, pp. 6–7, 127–143. The necessity for such supervision has increased through the years with the development of new uses for radio and with the increase in licensing of stations to individual or group users for special limited purposes. The amount of spectrum space allotted for each type of use has been determined, after extensive proceedings, on the basis of the comparative needs for radio of each of the groups of users involved.[6]

The maximum use of the radio spectrum re-

[6] The Federal Communications Commission is charged with a continuing supervision over many uses of radio in addition to its regulation of public broadcasting. Its regulations (Title 47, Code of Federal Regulations, Subchapter IB) extend to the control of the following radio services: experimental radio services (Part 5), public radio communication services (Part 6), stations on land in the maritime services (Part 7), stations on shipboard in the maritime services (Part 8), aviation service (Part 9), public safety radio services (Part 10), industrial radio services (Part 11), amateur radio service (Part 12), land transportation radio services (Part 16), industrial, scientific and medical service (Part 18), citizens radio service (Part 19), and disaster

quires that each licensee, authorized to operate in a very limited spectrum space allocated to him, adhere strictly to Commission regulations in the operation of his radio station. It is essential to the success of the Commission's allocation plan that the frequencies allocated for any particular use be employed exclusively for the designated purpose. As is true of all radio station licensing, the legislative standard of selection is the "public interest, convenience, or necessity". 47 U. S. C. 307. Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 222–223. Thus, the Commission has the obligation to insure that the persons licensed to operate on these scarce radio frequencies use them in the public interest and solely for the purposes for which they are licensed. This is especially true of radio stations transmitting on a frequency shared by many users, as in the instant case.

The authority of the Commission to perform this function is affirmatively granted by Section 303 (n) of the Communications Act (47 U. S. C. 303 (n)), which provides that the Commission shall:

> (n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United

communications service (Part 20). These services are defined at 47 C. F. R. 2.1.

> States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument or authorization under which they are constructed, installed, or operated.

It is particularly to be noted that this power of "inspection" covers not only "construction" and "installation", but also "operation." That must mean that the Commission is authorized to listen to, as well as to look at, radio stations required to be licensed by it.

The scope of this inspection, as including monitoring, is further made clear by the type of limitation and regulation which it is the Commission's duty to enforce.

The basic Section 301 (47 U. S. C. 301, *infra*, p. 63) which forbids operation of transmitters without license itself requires listening to detect unlicensed operations. And even when a station is licensed, the terms of the grant limit the frequency to be used and nature of the service to be rendered (47 U. S. C. 307), so that, if conditions of a license are to be restrictions in fact of a station's operations, it is essential that the Commission monitor. Section 303 (b) and (c). Failure to enforce this type of restriction would produce chaos in administering the frequency

allotment program, and particularly in supervising the licensing of stations for limited purposes of communication. The Commission could hardly limit the character of the communications it authorizes a particular licensee to transmit, without having some way of ascertaining whether the licensee adheres to those limitations.

The licensing provisions of the Act are not the only sections which depend upon monitoring for enforcement. Others include: Section 303 (e) which concerns the purity and sharpness of the emissions from stations; Section 303 (f) dealing with interference between stations; Section 303 (h) under which the Commission may establish areas within which a station must provide service but beyond which it may not lay down a signal; Section 303 (m) which authorizes the Commission to suspend licenses of operators who transmit superfluous radio communications, or signals containing profane or obscene words or who knowingly transmit false or deceptive signals, or use a call letter not legally assigned or who willfully or maliciously interfere with any radio communication; Section 321 (b) which sets forth certain requirements concerning the transmission of distress signals; and Section 325 (a) which prohibits the transmission of false or fraudulent distress signals.

Moreover, other sections of the Act indicate specific recognition by Congress that monitoring was to be a method by which the Commission

would perform its duties. Thus, in Section 4 (f) (3), as amended in 1954 by 68 Stat. 729 (47 U. S. C., Supp. II, 154), reference is made to the "Field Engineering and Monitoring Bureau of the Federal Communications Commission." In Section 4 (g), as amended in 1952 by 66 Stat. 711 (47 U. S. C. 154 (g)), the authority of the Commission to acquire land for the construction of monitoring functions was made clear. This section merely confirms the action of Congress in 1934 when it established the present Commission and transferred to it the property of its predecessor, the Federal Radio Commission, including "monitoring radio stations" (47 U. S. C. 603).

In addition to the obligation to monitor imposed on the Commission by its own Act, the United States has bound itself to monitor its own radio transmitting stations by international agreement. Article 17 of the Radio Regulations annexed to the International Telecommunications Convention, Atlantic City, 1947, and made a part thereof by Article 13 of the Convention itself, requires each signatory to "take necessary steps for frequent checks to be made of the emissions of the stations under their jurisdiction." (Treaties and Other International Acts Series, Dept. of State No. 1901, pp. 375–377.) Article 18 of those Regulations provides for the making of the checks required by Article 17 "by means of moni-

toring stations." (*Ibid.* 377–381.)[7] It may be noted in passing that these same regulations, in a manner similar to the Communications Act, bar unauthorized disclosures of intercepted messages, with no indication that there was any inconsistency in the two provisions.[8]

A similar arrangement was entered into with various countries of the Western Hemisphere in Article 10 of the Inter-American Radio Agreement of 1949, effective April 13, 1952. 3 U. S. T. 3080, 3084.

There can be no doubt, of course, that powers and duties of federal officers may be based on an appropriate exercise of the treaty power as well as on the strict legislative power. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *United States* v. *Pink*, 315 U. S. 203.

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[7] This convention and the annexed regulations were subsequently ratified by the Senate and were signed by the President on February 10, 1949 (*ibid.*, pp. 761–762).

[8] Article 21 (*ibid.*, p. 409) provides:

"The administrations bind themselves to take the necessary measures to prohibit and prevent:

"(a) the unauthorized interception of radiocommunications not intended for the general use of the public;

"(b) the divulgence of the contents, simple disclosure of the existence, publication or any use whatever, without authorization, of information of any nature whatever obtained by the interception of the radiocommunications mentioned in 486."

B. THE STATUTORY PROHIBITION IN SECTION 605 OF THE ACT O THE INTERCEPTION AND DISCLOSURE OF RADIO COMMUNICA TIONS DOES NOT CANCEL THE COMMISSION'S MONITORIN AUTHORITY.

The petitioners rely upon Section 605 of the Communications Act (47 U. S. C. 605) as rendering illegal the monitoring activities of the Commission engineers. In pertinent part that section provides:

* * * * *

> and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

* * * * *

This is the provision held to bar the use of evidence received by wiretapping in *Nardone* v. *United States*, 302 U. S. 379, and *Weiss* v. *United States*, 308 U. S. 321.

The question we have here, then, is whether the monitoring authority which Congress gave with one hand, as established in the preceding section of this brief, it took away with the other through Section 605. This is a question quite

apart from the holdings of the wiretapping cases which have come before this Court and which dealt with communications by wire, not radio, and which did not involve the supervisory authority of the Federal Communications Commission. It is, moreover, purely a question of statutory construction, since under *Olmstead* v. *United States*, 277 U. S. 438, Congress could empower the Commission to monitor if it desired to do so. We believe that the evidence of Congressional intent, both at the time it adopted Section 605 and since then, shows that it did not intend to bar monitoring of radio communications by Commission engineers.

The first legislative attempt to safeguard private radio communications was contained in the Radio Act of 1912 (37 Stat. 302) which established federal control over interstate radio, and established licensing requirements for station operators, to be supervised by the Department of Commerce and Labor. The nineteenth section of that Act was captioned "Secrecy of Messages" and provided as follows:

> No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such

> message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.

Significantly, this provision related to radio "messages", treating them as comparable to telegrams, and prohibited, not intercepting, but "divulging or publishing". Its principal purpose was obviously to guard the secrecy of messages transmitted or received by commercial message centers engaged in the business of public communication.

The nineteenth section of the 1912 Act was subsequently replaced by Section 27 of the Radio Act of February 23, 1927 (c. 169, 44 Stat. 1172).[9]

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[9] This provided:

"No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of com-

Section 27 contained the following phrase, clearly comparable to the language of Section 605 at issue in this case:

> * * * and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person * * *.

In 1929, this Court handed down its decision in *Olmstead* v. *United States*, 277 U. S. 438, holding that the rule of exclusion, as to evidence obtained in violation of the Fourth Amendment, did not apply to evidence obtained through the tapping of telephone wires, even though the law of the

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petent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress."

state involved prohibited such practice.[10] Thereafter numerous bills were introduced to overcome the effect of the *Olmstead* decision in the 71st [11] and 72d Congress,[12] all of which failed of passage. There were also various hearings on the subject.[13] In 1934, the year that the Communications Act was enacted, proponents of wiretapping legislation succeeded in writing into the Department of Justice Appropriation Act for the year ending

[10] The pertinent provisions of the Washington statute involved in the *Olmstead* case, as set forth in the opinion in that case (*Ibid.*, p. 468), reads:

"Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor."

[11] H. R. 5416, H. R. 4139 and S. 6061; see 71 Cong. Rec. 5968.

[12] H. R. 23, H. R. 5305, H. R. 9893, and S. 1396; see 75 Cong. Rec. 4546, 4733; 74 Cong. Rec. 3928.

[13] The House Appropriations Committee held hearings on the 1931 Department of Justice Appropriation Bill, at which the question of wiretapping practices by the Department was explored. *Hearings of the Appropriations Committee of the House of Representatives on the Justice Department Appropriation Bill for the fiscal year 1931*, December 2, 1929, p. 63. This bill was debated in the House on January 22, 1931, and an amendment, which subsequently was defeated, was offered providing that no part of the appropriation could be used for tapping telephone or telegraph wires. 74 Cong. Rec. 2901–2906.

On February 19, 1931, a full study was made of the use of wiretapping by the House Committee on Expenditures in Executive Departments which heard the testimony of Attorney General Mitchell and Prohibition Director Woodcock. *Hearings, Committee of Expenditures in the Executive Departments*, February 19, 1931, pp. 5–14.

June 30, 1934 (approved March 1, 1933) a provision that no part of the appropriation would be used for or in connection with "wiretapping" to procure evidence of violations of the National Prohibition Act, 47 Stat. 1381. During all the various debates no mention was made of any desire to place restrictions on the Federal Radio Commission in its use of monitoring, which as we shall show (*infra*, pp. 40–44) had by that time become an established practice of that Commission. It seems evident, therefore, that when Section 605 was reenacted in the 1934 Act it was not intended to apply to monitoring by the Commission in enforcement of the regulation of radio contemplated by that Act. The only significant explanation of Section 605 was contained in House Report 1850, 73rd Cong., 2d Sess. (p. 9) and read:

> Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act, but is also made to apply to wire communications.

From this summary remark, one certainly cannot infer that Congress contemplated that the section would now apply—in contrast to Section 27 of the Radio Act—to monitoring by the Commission in enforcing its regulatory and licensing provisions.

During this same period of time, the practice of monitoring had become firmly established as an appropriate and necessary method of enforcing the Act.

In the years following the passage of the Radio Act of 1912 it became apparent to persons responsible for its administration in the Department of Commerce and Labor that effective enforcement of the licensing provisions of the communication laws would require some form of monitoring to ascertain whether the sending equipment was being operated in compliance with the law. In 1925, the first radio test car was put into use equipped with portable radio direction finding equipment for the use of monitoring and locating unlicensed transmitting equipment. This vehicle also had such frequency measuring equipment as was then available. The use of this equipment was so successful that by 1928 three additional cars were put into service by the Department of Commerce and, in 1929, four more. At that time the Radio Division of the Department of Commerce was divided into nine inspection districts, each having a district office equipped with various types of monitoring equipment including radio direction finding and frequency measuring devices. It became apparent at this time, however, that more extensive facilities were needed, and on February 21, 1929, the construction of a central frequency monitoring station to be built near the geographical center of the United States was authorized (45 Stat. 1255) and monies for this purpose were appropriated by Congress (45 Stat. 1636). Work on

this facility was begun in October 1929, and it was completed in 1931.

In 1931, on completion of the Central Frequency Monitoring station in Grand Island, Nebraska, a nation-wide monitoring system was established for the first time. The Grand Island facility was operated in conjunction with nine secondary frequency monitoring stations [14] to inspect the operation of radio stations all over the country. In addition, radio test cars were used in cooperation with the other units of the system especially for the purpose of locating low powered radio transmitters deviating from their assigned frequency.[15]

By 1932, the number of radio test cars had increased to eight, and there were ten monitoring stations in operation. In 1933, the entire Radio Division of the Department of Commerce was transferred to the Federal Radio Commission, and in the reorganization the total number of monitoring stations was reduced from 10 to 7.

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[14] These were strategically located at Hingham, Massachusetts; Fort McHenry, Baltimore, Maryland; Atlanta, Georgia; New Orleans, Louisiana; San Pedro, California; Larkspur, California; Portland, Oregon; Detroit, Michigan; Chicago, Illinois. Also there was a secondary monitoring station at Grand Island, Nebraska, which had just been completed.

[15] A detailed description of the monitoring service as it had developed up to July 1, 1931, is contained in a Department of Commerce monograph entitled "Radio Activities of the Department of Commerce." (G. P. O. July 1, 1931.)

By 1934, when the Communications Act was passed, the nation-wide monitoring systems was so well established as to merit scant attention by Congress except to the extent that its facilities were transferred by Section 603 (b) of the new legislation from the Federal Radio Commission to the Federal Communications Commission. It is apparent, however, that Congress intended no important departures in federal supervision of radio under the new Act. The report on the bill (H. Rep. No. 1850, 73d Congress, 2d sess., p. 3) stated:

> * * * it is the primary purpose of this bill to create such a commission armed with adequate statutory powers to regulate all forms of communication and to consider needed additional legislation. The bill is largely based upon existing legislation and except for the change of administrative authority does not very greatly change or add to existing law; most controversial questions are held in abeyance for a report by the new commission recommending legislation for their solution.

There is thus no indication that Congress intended to cut down the practice of monitoring, which had never been challenged under either of the two previous radio acts, despite the presence in those statutes of provisions comparable to Section 605 of the 1934 Act.

Following passage of the Communications Act, the Federal Communications Commission con-

tinued to monitor in enforcing the various provisions of the Act. In the Sixth Annual Report of the Federal Communications Commission for Fiscal Year Ending June 30, 1940, this function of the Commission was described as follows (*ibid.*, pp. 11–12):

> In administering and enforcing laws, regulations, and international treaties pertaining to radio, the Commission depends in large measure on its field staff. The ether waves are, in effect, patrolled by field offices strategically located throughout the United States and its possessions, augmented by seven main monitoring stations. The latter are at Atlanta, Baltimore, Boston, Grand Island (Nebr.), Allegan (Mich.), San Pedro (Calif.), and Portland (Oreg.).
>
> Monitoring stations are the Commission's "listening posts." In general, they do not participate in the investigation of unauthorized transmission other than to report and record such signals as proof of operation. The task of tracing unlicensed stations is performed mainly by inspectors. The latter are radio engineers and, in addition, are capable radio operators. Many have had previous experience in military, maritime, aviation, and other communications services. They are familiar with technical procedure, which is of material aid in uncovering illicit use of radio.
>
> At each radio district headquarters, specially equipped automobiles are provided

for investigation work. Some of these cars are equipped with all-wave receivers which, when necessary, may be removed from the car for operation. The mobile equipment is also used to transport examination and technical equipment.

Besides seeking out unlicensed operators, the Commission's field staff inspects all classes of radio stations—broadcast, police, ship, amateur, aviation, etc.; examines radio operators for various classes of licenses; monitors radio transmission for adherence to frequency, quality of emission, and compliance with prescribed procedure; conducts field strength surveys and analyzes signal characteristics; and investigates complaints of interference to radio reception. During the last fiscal year the Commission investigated more than 1,000 complaints of unlicensed operation, and the number of these and other cases pressing for investigation is growing under the present situation.

Moreover, Congress has continued to recognize the Commission's use of monitoring, after the original adoption of the provision against interception and divulgence in the 1927 Radio Act, prior to, contemporaneously with, and subsequent to, the reenactment of the section in 1934. In the period between 1927 and 1934, Congress specifically authorized the purchase of land for monitoring (45 Stat. 1255; 46 Stat. 164, 872; 48 Stat. 805). Contemporaneously with the re-

enactment of the prohibition, Congress provided in Section 603 (b) for the transfer of monitoring facilities from the old Commission to the new. And since 1934 Congress, in addition to making annual appropriations for monitoring, has through amendments to Sections 4 (f) (3) and 4 (g) made specific reference to the monitoring functions of the Commission.[16]

Bearing in mind that the issue is one of statutory construction, we submit that the indications are clear that Congress did not intend to limit the Commission's powers and duties of inspection, including monitoring, by Section 605.

C. THE APPLICATION OF THE GENERAL MONITORING AUTHORITY TO THE OPERATIONS OF PETITIONERS' STATION WAS PARTICULARLY APPROPRIATE

As pointed out in the Statement, *supra*, pp. 6–7, petitioners' station was licensed for industrial use only in connection with the petitioners' farming operations. As was also pointed out, frequencies assigned for such uses are not exclusively allocated to the use of an individual licensee, but are shared with other industrial users. (47 C. F. R. 11.8). The signal from petitioners' station had a range of a 70-mile radius, an area

[16] This Court has recognized that Congress in effect ratifies administrative interpretations of its legislation when it appropriates funds to implement administrative action taken pursuant to such interpretations. *Ibrandtsen-Moller Co., Inc.* v. *United States*, 300 U. S. 139, 147; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116.

which extended into California and Mexico (R. 44). Thus, while monitoring of all radio communications is an essential part of the Commission's enforcement of the Communications Act, these factors made it particularly appropriate, and necessary, to include monitoring in the inspection of petitioners' operations.

The fact that petitioners were operating on a frequency shared with others has two consequences. One is that its communications must constantly be listened to by others than the immediate sender and the intended receiver. Not only the chance dial-twiddler and the youthful radio enthusiast, but also the petitioners' co-licensees for industrial use on the particular channel, can and must be expected to hear communications transmitted from their station. In other words, this is a party line of huge dimensions reducing privacy to an absolute minimum.

The second result of the sharing of the frequency is the need that the use of the station be limited to the purposes for which it was licensed. One licensee should not be permitted to "hog" the air to the detriment of his neighbors; his messages are required to be held to the minimum necessary to carry on his particular industrial use (47 C. F. R. 11.151 (a)). In such a situation, particularly, monitoring is an appropriate method of enforcement.

The location of petitioners' station also illustrates the appropriateness of monitoring it. The engineers testified that at times during their operation they were within 75 feet of the Mexican border (R. 43). This certainly brings into play the obligation of the United States under the treaties referred to above (*supra*, pp. 32–33) to police the international aspects of radio communication.

These factors are adverted to not because we believe the Commission's authority to monitor is restricted to this type of operation: on the contrary, there is not the slightest indication in the grant of authority discussed in Point IA, or the legislative history discussed in Point IB, that the Commission should not monitor wherever and whenever it is necessary and appropriate in carrying out its functions. However, the particular facts of this particular operation illustrate vividly the near-absurdity of questioning the Commission's authority here. On the one hand, the Commission could not enforce the requirements of the Act and the regulations in this crowded field if it could not listen at will to petitioners' transmissions; on the other hand, petitioners can hardly claim any real invasion of privacy when their communications are necessarily open to the ears of all who care to tune-in and listen.

II. INFORMATION LAWFULLY ACQUIRED THROUGH AN AUTHORIZED MONITORING OPERATION MAY BE USED FOR ALL PURPOSES IN PREPARING FOR AND TRYING A CASE FOR VIOLATION OF ANY FEDERAL CRIMINAL LAW

The court below held that, although engineers of the Federal Communications Commission appeared to be authorized to monitor for purposes of enforcing the Communications Act, they could not turn over to prosecuting officials information as to violation of other federal laws. The only authorities cited for this position, that evidence lawfully obtained is to be limited in its use, were *Weeks* v. *United States,* 232 U. S. 383, *Nardone* v. *United States,* 302 U. S. 379, and 308 U. S. 338, and *Weiss* v. *United States,* 308 U. S. 321.

This Court explained in the *Weiss* and *Nardone* cases, which deal directly with the application of Section 605 of the Communications Act to evidence obtained by intercepting messages transmitted by wire, that since Section 605 renders the interception and divulgence of telephone messages illegal, the Court would bar the use of such evidence, or other information secured by following it up, in evidence. Thus, the Court followed its earlier precedent, established in the *Weeks* case, that the use in evidence of information gained by an illegal search or seizure is forbidden. In both types of cases the judge-made rule of evidence was established as a sanction to discourage illegal wiretapping, or illegal searches and sei-

zures, by denying prosecutors all benefits from the prohibited activity. Cf. *Walder* v. *United States,* 347 U. S. 62, 65; *Rea* v. *United States,* 350 U. S. 214. But the rule of exclusion is not applied where the official action of search or inspection is *not* illegal, or where, even though it is illegal, justice would not be served by an automatic application of the *Weeks* and *Nardone* principle. Cf. *Walder* v. *United States, supra; Carroll* v. *United States,* 267 U. S. 132; *Brinegar* v. *United States,* 338 U. S. 160.

In the light of these objectives and limitations of the exclusion principle, it is submitted that the court below erred in extending the rule of the wiretapping cases to the case before it. The significant distinctions in the situations make the application of the rule entirely inappropriate—Commission monitoring is wholly lawful (as we have shown) and carries no stigma or taint whatsoever.

In the first place, there is not here involved any type of private communication surreptitiously intercepted. Instead, petitioners were in effect shouting from their rooftop to anyone who wished to listen, well aware that strangers must overhear their messages. In particular they were fully aware when they received their license that the Commission could, and might well, monitor their operations (*supra,* pp. 8–9). It was as though a person mailing a package as third-class mail with a sticker saying, "Postmaster, This

may be opened for inspection," should object when his invitation was accepted.[17] These applicants took their license subject to the right of the Commission to monitor; they cannot object when that right is exercised.

But even more significant, those who overheard in this case were authorized by Congress to do so. The monitoring activities of the Federal Communications Commission engineers were not only not illegal; they were authorized, and in fact required, as a part of the Commission's statutory duties. The fact that their monitoring disclosed violations of the immigration law as well as violations of the Communications Act cannot make illegal what would otherwise be legal. And if there was no illegality in the listening and no violation of privacy, there is no public interest to be served by denying the Government the use of the information as evidence in any case in which it may be pertinent.

Again, an analogy to third class mail suggests itself. Suppose that the postal inspector in inspecting a package finds not only that it contains hand-written messages, which may not be mailed in that class, but also that the contents of the messages constitute threats against the life of the President. Surely, those documents can be turned over to the proper authorities for

[17] In *Ex parte Jackson*, 96 U. S. 727, this Court stated that the right of privacy accorded to first-class mail did not apply to matter open to examination.

appropriate action, even though postal inspectors are concerned primarily with law enforcement within the postal field. In sending mail third-class, one knows that it is open for inspection by the postal authorities, and those officials act with full legality when they open and inspect such mail. That is precisely the situation here.

Similarly, when a policeman, upon lawfully arresting a man for one felony, searches his person and discovers evidence of another crime, that evidence is indisputably admissible. See *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Harris* v. *United States*, 331 U. S. 145, 151, 168. The broad principle is the same—where the act of "inspection" is fully lawful its fruits may be used though they were unanticipated. The same is true of every search or seizure which is lawfully made, whether because a valid warrant has been issued or because there is probable cause to believe illegal activities are being carried on in a movable vehicle or otherwise. If the search or seizure or inspection is wholly lawful in itself, there is no reason or rule to exclude whatever evidence may be uncovered in its course.

A recent case in this Court involving this general principle is *Zap* v. *United States*, 328 U. S. 624 (reversed on other grounds, 330 U. S. 800), where federal agents were conducting an audit in connection with a cost-plus war contract. A check was discovered supporting a charge that

there had been a violation of the False Claims Act. The agents retained this check, and its use in evidence was upheld by this Court. The Court stated (p. 629):

> The agents, therefore, were lawfully on the premises. They obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection. They were not trespassers. They did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the Government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge. * * *

In *Harris* v. *United States*, 331 U. S. 145, a search was conducted in connection with a valid arrest under an arrest warrant and evidence was discovered and seized which related to a separate offense from that leading to the arrest. In upholding the use of this evidence, the Court stated at page 155:

> * * * If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that

such property is on the premises when the search is initiated.[18]

In important respects the circumstances of the instant case make it even *a fortiori* from these precedents. No Fourth Amendment issue is involved in the interception of communications. *Olmstead* v. *United States*, 277 U. S. 438. And, furthermore, there was in this case no seizure of any kind, no taking or retention of physical property of the petitioners, a factor considered of great significance in the dissents in the *Zap* and *Harris* cases. Moreover, the information they turned over to the United States attorney was not collateral information they happened upon; but the

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[18] Much earlier, in passing upon a comparable issue with respect to the right to use evidence in the New York courts, this Court stated in *Adams* v. *New York*, 192 U. S. 585, 598:

"* * * The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

identical communications they were legally authorized to monitor.

In some respects the case is similar to, but stronger than, *On Lee* v. *United States*, 343 U. S. 747, and *Goldman* v. *United States*, 316 U. S. 129, in that there was here no intrusion upon the petitioners' property without their consent. There was, of course, a listening to their radio communications, but, if that was authorized by law as we argue above, the result should be the same, particularly since that listening was a proper condition of their license to operate.

Or the factual situation may be compared with that in *Milam* v. *United States*, 296 Fed. 629 (C. A. 4), where the court stated at p. 632:

> The case before us is this: Federal prohibition officers, having definite information that professional criminals were conveying in a motor car a quantity of whiskey along a certain road about a certain time, were on the watch to intercept it. They stopped the defendants' truck, opened it, and found, instead of whiskey, Chinamen in the course of unlawful transportation. Assuming that this was a search of the truck, under these circumstances we hold that the search was not unreasonable, and that the evidence obtained was competent.

See also *Steele* v. *United States*, 267 U. S. 498; *United States* v. *Two Soaking Units*, 48 F. 2d 107 (C. A. 2), certiorari denied, 284 U. S. 627; *Paper* v. *United States*, 53 F. 2d 184 (C. A. 4); *United*

States v. *Old Dominion Warehouse, Inc.*, 10 F. 2d 736 (C. A. 2).[19]

Before we leave this point, it may be appropriate to express a word of caution with respect to the limits of our position in this case. In pointing out the nature of the petitioners' operations on a frequency shared with others, we do not mean to imply that Section 605 of the Communications Act has under other circumstances either full, partial or no application to the interception and use of such messages. There is before the Court only the question of monitoring by Commission engineers in the performance of their normal functions; the Court is not called upon to consider the situation where private persons intercept messages and use them for personal profit. Nor need the Court consider situations where authorized Commission monitors acquire information as to the contents of messages being transmitted by radio and disclose them to others for personal profit or other ends improper in themselves. Also, this case does not involve interception by government officials other than Commission personnel. The case deals solely with official Commission monitoring and the disclosure of criminal acts to a coordinate branch of the government for official use.

[19] An analogy could also be drawn to a similar situation where this Court refused to apply the *McNabb* rule to a confession obtained from a prisoner committed for a different offense from that which was the subject of the confession. *United States* v. *Carignan*, 342 U. S. 36.

III. IN ANY EVENT, THE TRANSMISSIONS IN THIS CASE WERE WHOLLY ILLEGAL UNDER THE COMMUNICATIONS ACT AND THEREFORE NOT WITHIN THE PROTECTION OF SECTION 605.

The admissibility of the evidence in this case may also be sustained on the narrower ground relied upon by the court below, although not carried to the full extent of its rationale, *i. e.,* that the transmissions in this case, being illegal under the Communications Act, were not within the protection of Section 605. Since the section is designed to protect the system of communication which the act regulates (*Goldman* v. *United States,* 316 U. S. 129, 133), it cannot have been intended to protect communications which are outside of, and in violation of, the system which the Act and the regulations are designed to establish. As the court below said (R. 93), "before any right of privacy exists under Section 605 the voice must be legally on the air." Section 605 was not designed to throw a mantle of protection over communications sent in violation of the very Act under which the protection is granted.

The court below, in the only other reported case on the question, had reached the same conclusion with respect to unlicensed broadcasts in *Casey* v. *United States,* 191 F. 2d 1.[20] There, the

[20] Although the *Casey* case was ultimately reversed by this Court (343 U. S. 808), the reversal was on the basis of a confession of error by the government limited to the issue of whether the search by government agents of an automobile

defendants, operating unlicensed equipment, had the results of races transmitted from the track immediately in time to have a bet placed with a bookie on the winning horse before the results of the race were generally known. The operations were first discovered by amateur radio operators (illustrating the practical impossibility of privacy). The radio was eventually located by Commission engineers through the use of mobile equipment. The court of appeals, as in the instant case, deemed the fact that the transmission was unlicensed the controlling factor in reaching its conclusion that the transmissions were not protected by Section 605 (191 F. 2d at p. 4). It might, however, have reached the same conclusion on the basis that, since the "means" of communication involved constituted a criminal violation of the Communications Act, no transmissions were within the protection of Section 605.

To the extent that the legislative history of Section 605 bears on the subject, it supports this construction since Congress had ample notice of the practice of policing unlicensed and illegal operations prior to its reenactment of Section 605 in 1934. Under the Radio Act of 1927, the Federal Radio Commission customarily investigated var-

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and seizure of its contents for use in evidence was an unreasonable search and seizure. The question of the proper construction of Section 605, as applied to illegally transmitted radio communications, was excepted from the government's concession. See Br. for U. S., pp. 23–25, No. 379, O. T. 51.

ious types of violations involving both unlicensed and unauthorized operation of radio equipment. In some cases it merely took administrative action against the persons involved. In other cases it referred the evidence to the Department of Justice for prosecution. The activities of the Federal Radio Commission in this field just prior to the passage of the 1934 Act are set forth in the Sixth Annual Report of the Federal Radio Commission for the Fiscal Year 1932, pp. 12–15. This report stated (*Ibid*, p. 15) "the violations dealt with are primarily of two types: (1) Plain violations of the criminal provisions of the Radio Act of 1927, and (2) violations of the criminal provisions of the Radio Act of 1927 in conjunction with other illegal activities, such as smuggling or rum running." One of the cases of the latter type in which the Radio Commission had participated in that year (*United States* v. *Frederick H. Simpson*) involved the unlawful operation of a radio station whose signals were used in connection with rum-running boats (*ibid.*, p. 14), a situation closely analogous to the instant case.

If Section 605 does protect only voices "legally on the air," then all the evidence in this case was without the scope of that section. None of the transmissions involved were legal under the Communications Act. The illegality does not lie solely in the fact that, with the possible exception of September 18, 1953, petitioners were operating without permits, in violation of Section 318 of

the Act (*infra*, p. 68).[21] Even had they been fully licensed at all times, the use to which they put their transmitting equipment was completely outside the very limited authority conferred by their license and consequently outside of the protection of any right of privacy of communication to which they are entitled under Section 605 of the Act.

Section 301 (47 U. S. C. 301) of the Communications Act, pertaining to the licensing of radio communications, specifically provides that "no * * * license shall be construed to create any right, beyond the terms, conditions, and periods of the license" and that "no person" shall use such facilities except in accordance with the requirements of the Act and his license. Another section of the part of the Act pertaining to "station licenses; form and conditions" provides (47 U. S. C. 309 (d)):

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[21] Section 318 prohibits the operation of a station required to be licensed except by a person holding an operator's license. The court of appeals assumed that petitioners became authorized to transmit on September 17, 1953, the date their operators' permits were issued by the Federal Communications Commission from the Los Angeles office (R. 93), and therefore, that petitioners were "legally on the air" after that date. However, the regulations require that operators' permits be in the actual possession of the sender while operating a base station (47 C. F. R., 1953 ed., 11.155, *supra*, p. 16). Since the date of receipt is not shown, it is not clear on this record whether petitioners were qualified to transmit for any purposes on September 18, 1953, the last day that any monitoring occurred.

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> Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; * * *.

The station license issued to petitioners for the special use of a radiotelephone on their farm was issued pursuant to Section 301, and the conditions prescribed under subsection K of Part 11 of the Commission's Regulations 47 C. F. R. [1953 ed.] (see Section B of the Statement, *supra*, pp. 12–17). These regulations provide for the issuance of radio station licenses "to various industrial enterprises which, for safety purposes or other necessity, require radio transmitting facilities in order to function efficiently." *Ibid.*, 11.1 (*supra*, p. 12). Under the Act and the regulations, therefore, petitioners were limited in their use of the radio transmitting equipment to the kind of activity described in their application for a station license and noted on the license itself, *viz.*, for farming operations (see *supra*, pp. 6–7). They were certainly not authorized to use the radio as the very means of violating the criminal laws of the United States relating to illegal immigrants.

There are many situations in the law where a privilege attaching to a relationship or transaction is removed when a criminal activity is directly involved. For example, the privilege against disclosure of communications between a lawyer and his client is refused if the relationship has been the means of perpetrating a crime or a fraud. *Clark* v. *United States,* 289 U. S. 1; *United States* v. *Bob,* 106 F. 2d 37 (C. A. 2), certiorari denied, 308 U. S. 589; *Regina* v. *Cox,* [1884] 14 Q. B. D. 153. And so here the license was to carry on legitimate farm operations, not to perform the criminal act of harboring aliens illegally in the United States.

The transmissions here involved were thus wholly outside the scope of petitioners' license and in violation of the Act and regulations of the Commission, irrespective of the absence of operators' licenses. They were thus wholly outside the protection of Section 605—even if it be construed to cover the divulgence of some information obtained through Commission monitoring—and *in toto* admissible in evidence against petitioners.

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CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

APRIL 1956.

APPENDIX A

The following provisions of the Communications Act of 1934, 48 Stat. 1064, c. 652, as amended, are pertinent to this case (as they appear in Title 47 of the United States Code):

47 U. S. C. 301:

License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the

borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U. S. C. 303:

Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

* * * * *

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in con-

struction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter.

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 U. S. C. 309 (d):

Station licenses; form and conditions.

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies

designated in the license beyond the term thereof nor in any other manner than authorized therein; * * *

47 U. S. C. 318

Transmitting apparatus; operator's license.

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: *Provided, however,* That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: *Provided further,* That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

47 U. S. C. 401:

Enforcement of chapter and orders of Commission; jurisdiction.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the

Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U. S. C. 501:

General Penalty.

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

47 U. S. C. 605:

Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels, of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distribut-

ing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

IN THE MATTERS OF—

Docket No. 10780

JEAN S. SUGDEN, YUMA, ARIZONA

Docket No. 10781

ROBERT V. H. SUGDEN, YUMA, ARIZONA

SUSPENSION OF RESTRICTED RADIOTELEPHONE OPERATOR PERMITS

Docket No. 10740

ROBERT V. H. SUGDEN, ROUTE 1, BOX 629, YUMA, ARIZONA

ORDER TO SHOW CAUSE WHY THE LICENSE FOR SPECIAL INDUSTRIAL STATION KOG-285 SHOULD NOT BE REVOKED

Order

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 14th day of October, 1954;

The Commission having under consideration a joint motion filed on September 17, 1954 by the Chief of its Field Engineering and Monitoring

Bureau and its Safety and Special Radio Services Bureau requesting cancellation of the permits and licenses involved and dismissal of the above-entitled proceedings with prejudice;

It Appearing, That on October 28, 1953 the Commission adopted orders suspending the Restricted Radiotelephone Operator Permits of Jean S. Sugden and of Robert V. H. Sugden for a period of the remainder of the license terms and simultaneously therewith issued an order directing that Robert V. H. Sugden appear at a hearing to be held in Washington, D. C. and show cause why the license of his Special Industrial Station KOG–285 should not be revoked; and

It Further Appearing, That Robert V. H. Sugden entered an appearance in the said revocation proceeding and that Jean S. Sugden and Robert V. H. Sugden requested hearings on the suspension of their said operator permits under the provisions of Section 303 of the Communications Act of 1934, as amended, and Section 1.404 of the Commission's Rules Relating To Practice and Procedure and accordingly on November 25, 1953 orders were adopted designating the said orders of suspension for hearing; and

It Further Appearing, That on July 22, 1954, the Commission received the said operator permits of Robert V. H. Sugden and of Jean S. Sugden and the license for Station KOG–285 with requests by these parties for cancellation of said permits and license and accordingly petitioners allege that no useful purpose would now be served by proceeding with the above-entitled hearings and request cancellation of the said permits and license and dismissal of the said hearing proceedings; and

It Further Appearing, That the matters giving rise to suspension of the said permits and issuance of the said Order to Show Cause are now the subject of certain proceedings instituted by the United States Department of Justice in the United States District Court in the District of Arizona and that the administrative proceedings herein were designed to determine solely whether the authorizations issued by this Commission to Robert V. H. Sugden and Jean S. Sugden should be terminated and therefore surrender by these parties of the said permits and license for cancellation nullifies the purpose for which the hearings herein were ordered and accordingly no useful purpose would be served by proceeding with such hearings, but that it is inappropriate to dismiss them with prejudice as requested;

It Is Ordered, That the said petition is granted insofar as it requests cancellation of the Restricted Radiotelephone Operator Permits of Jean S. Sugden and Robert V. H. Sugden and the license of Station KOG–285 and dismissal of the above-entitled proceedings and is denied insofar as it requests dismissal with prejudice and the said permits and license are cancelled and the above-entitled proceeding are dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING, *Acting Secretary.*

Released October 14, 1954.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

Docket No. 10740

IN THE MATTER OF REVOCATION OF LICENSE OF SPECIAL INDUSTRIAL STATION KOG-285, ROBERT V. H. SUGDEN, ROUTE 1, BOX 629, YUMA, ARIZONA

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 28th day of October, 1953;

The Commission having under consideration alleged violations of the Communications Act of 1934, as amended, and the Rules of the Commission committed by the licensee of the above-described station during the course of the operation thereof;

It appearing, That on August 26, 1953, Robert V. H. Sugden was authorized to operate under the call sign KOG-285 a station in the Special Industrial Radio Service governed by Part 11 of the Commission's Rules; and

It Further Appearing, That on August 23, 1953, Robert V. H. Sugden wilfully transmitted or caused to be transmitted communications and signals by radio in violation of Section 301 of the Communications Act; and

It Further Appearing, That during the period from September 4 to September 18, 1953, Station

KOG–285 was wilfully operated in a manner contrary to the public interest, the terms of the license, the law and the Commission's regulations in the following particulars:

(a) Unauthorized communications in violation of Section 11.151 of the Rules of the Commission were repeatedly transmitted by the licensee over the facilities of his station;

(b) The station was operated on several occasions by a person who was not a holder of an appropriate operator authorization issued by the Commission in violation of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Commission's Rules;

(c) No frequency, power, and modulation measurements were made as required by Section 11.108 of the Commission's Rules;

(d) No station records were maintained as required by Section 11.160 of the Commission's Rules;

(e) The Commission's Engineer in Charge of the district in which Station KOG–285 is located was not notified prior to the commencement of the station's operation as required by Section 11.52 (c) of the Commission's Rules.

It Further Appearing, That Station KOG–285 was repeatedly used by the licensee thereof in connection with and in furtherance of illegal activities violative of the laws of the United States and was used to thwart the efforts of the officers of the Immigration and Naturalization Service to enforce the Immigration and Nationality Act;

It Is Ordered, Pursuant to Section 312 (c) of the Communications Act of 1934, as amended, that Robert V. H. Sugden show cause why the

license of his Special Industrial Station KOG-285 should not be revoked; and

It Is Further Ordered, That a hearing in this matter will be held in Washington, D. C., on the 1st day of December, 1953, in order to determine whether an Order revoking said license should be issued and that Robert V. H. Sugden is herewith called upon to appear at this hearing and give evidence upon the matters specified herein;* and

It Is Further Ordered, That the Secretary shall mail a copy of this Order to the licensee by Registered Mail—Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING, *Acting Secretary.*

Released October 29, 1953.

*Section 1.102 of the Commission's Rules provides that in order to avail himself of the opportunity to appear before the Commission at the time and place specified in the Show Cause Order, the licensee shall within thirty (30) days from the date of receipt of this Order inform the Commission in writing whether he will appear or whether he waives his rights to a hearing. Waiver of a hearing may be accompanied by a statement of reasons why said licensee believes that an Order of Revocation should not be issued. A waiver unaccompanied by such a statement will be deemed to be an admission of the allegations specified in this Order. Failure to respond within the above 30-day period, or failure to appear at the hearing, will be deemed to be a waiver of the right to a hearing and an admission of the allegations specified in the Order to Show Cause.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

Docket No. 10780

IN THE MATTER OF JEAN S. SUGDEN, YUMA, ARIZONA, SUSPENSION OF RESTRICTED RADIOTELEPHONE OPERATOR PERMIT

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 25th day of November, 1953;

It Appearing, That acting in accordance with the provisions of Section 303 (m) (2) of the Communications Act of 1934, as amended, Jean S. Sugden, Yuma, Arizona filed with the Commission within the time provided therefor an application requesting hearing on the Commission's order of October 28, 1953 suspending for a period of the remainder of the license term her Restricted Radiotelephone Operator Permit PR-11-71027; and

It Further Appearing, That under the provisions of Section 303 (m) (2) of the Communications Act of 1934, as amended, said licensee is entitled to a hearing in the matter; and that upon the filing of a timely written application therefor the Commission's order of suspension is held in abeyance until the conclusion of the proceeding in the said matter.

It Is Ordered, This 25th day of November 1953 that the matter of the suspension of the Restricted Radiotelephone Operator license of Jean S. Sugden is hereby designated for hearing before a Commission examiner in the offices of the Commission in Washington, D. C., at 10:00 a. m. on June 1, 1954, upon the following issues:

(1) To determine whether at any time between September 4 and September 18, 1953, inclusive, Jean S. Sugden wilfully operated a unit of radio station KOG–285 to transmit unauthorized communications in violation of Section 11.151 (a) of the Commission's rules and the terms of the station license.

(2) To determine if Jean S. Sugden, between September 4 and September 18, 1953, inclusive, operated a unit of radio station KOG–285 without holding a radio operator license or permit issued by the Commission in violation of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) of the Commission's rules.

(3) If the licensee committed such violation, to determine whether the facts or circumstances in connection therewith would warrant any change in the terms of the Commission's order of suspension.

It Is Further Ordered, That a copy of this order be transmitted by registered mail, return receipt requested to Jean S. Sugden, Yuma, Arizona.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING, *Acting Secretary.*

Released December 1, 1953.

APPENDIX C

In the United States District Court in the District of Arizona

No. C—Phoenix

United States of America, plaintiff

v.

Robert V. H. Sugden, defendant

Indictment

Viol: 47 U. S. C. 318 and 501 (Communications Act)

The grand jury charges:

Count One

That on or about August 23, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for transmission of energy or communications or signals by radio to wit: radio-telephone transmitters installed in motor vehicles and did send radio communications or signals into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona without a license having first been granted in his behalf by the Federal Communications Commission as required by Section 301 of the Communications Act of 1934, as

amended, in violation of Title 47 United States Code, Section 501, as amended.

COUNT TWO

That on September 4, 1953 in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and to send radio communications or signals into channels of interstate or foreign radio transmissions operated by Jean S. Sugden, the effects of which extended beyond the borders of the State of Arizona, knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT THREE

That on September 5, 1953, in Yuma County, Arizona, within the District of Arizona, Defend-

ant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and operated by Jean S. Sugden, to send radio communications or signals into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona, the said Robert V. H. Sugden, knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG–285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT FOUR

That on September 9, 1953 in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and operated by Jean S. Sugden, to send radio communications or signals into channels of interstate or foreign radio

transmission, the effects of which extended beyond the borders of the State of Arizona, the said Robert V. H. Sugden knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under the license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG–285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT FIVE

That on September 10, 1953, in Yuma County, Arizona, within the district of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and operated by Jean S. Sugden, to send radio communications or signals into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona, the said Robert V. H. Sugden knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the

provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT SIX

On September 4, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications

Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmission of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

COUNT SEVEN

On September 5, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmissions of (a) communications related directly to the safety of life or the protection of property and (b) communications con-

sidered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

COUNT EIGHT

On September 9, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmission of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

Count Nine

On September 10, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmissions of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

Count Ten

On September 18, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and know-

ingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmission of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

A true bill.

(Signed) J. CLAYTON BAIN,
Deputy Foreman.

EDWARD W. SCRUGGS,
United States Attorney.

_____,
Assistant United States Attorney.

In the United States District Court in the District of Arizona

No. C–11557—Phoenix

UNITED STATES OF AMERICA, PLAINTIFF
v.
JEAN S. SUGDEN, DEFENDANT

Indictment

Viol: 47 U. S. C. 318 and 501 (Communications Act)

The grand jury charges:

COUNT ONE

On September 4, 1953, in Yuma County, Arizona within the District of Arizona Defendant Jean S. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona without a radio operator's license or permit having first been issued by the Federal Communications Commission to said Defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (c) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Defendant being then and there set up as a radio station in the Special Industrial Radio Service for which a radio sta-

tion license is required under said Act, and which station was on said date under license from said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG–285, in violation of Title 47, United States Code, Sections 318 and 501, as amended.

COUNT TWO

On September 5, 1953, in Yuma County, Arizona within the District of Arizona, Defendant Jean S. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona, without a radio operator's license or permit having first been issued by the Federal Communications Commission to said Defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license from said Federal Communications Commission to said Title 47, United States Code, Sections 318 and 501, as amended.

COUNT THREE

On September 9, 1953, in Yuma County within the District of Arizona, Defendant Jean S.

Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona without a radio operator's license or permit having first been issued by the Federal Communications Commission to said defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Defendant being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license from said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47, United States Code, Sections 318 and 501, as amended.

COUNT FOUR

On September 10, 1953 in Yuma County within the District of Arizona Defendant Jean S. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona without a radio operator's license or permit having first been

issued by the Federal Communications Commission to said Defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (c) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Defendant being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license as required under said Act, and which station was on said date under license from said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47, United States Code, Sections 318 and 501, as amended.

A true bill.

———— ————,
Deputy Foreman.

EDWARD W. SCRUGGS,
United States Attorney.

———— ————,
Assistant United States Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1936

APRIL 30, 1956.

Decisions Per Curiam.

No. 555. SUGDEN ET UX. *v.* UNITED STATES. Certiorari, 350 U. S. 952, to the United States Court of Appeals for the Ninth Circuit. Argued April 25, 1956. Decided April 30, 1956. *Per Curiam:* The judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS dissent. *Mark Wilmer* argued the cause for petitioners. With him on the brief was *Frank L. Snell*. *John F. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Carl H. Imlay*. Reported below: 226 F. 2d 281.